TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 201.

ALICE A. CABLE, ADMINISTRATRIX OF THE ESTATE OF HERMAN D. CABLE, DECEASED, PETITIONER,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 8, 1908.
CERTIORARI AND RETURN FILED MAY 20, 1908.

(18,476.)

(18,475.)

SUPREME COURT OF THE UNITED STATES.

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No. 290.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Pleas in the Circuit Court of the United States for the Northern District of Illinois—Northern Division, in Chancery sitting at the United States Court room, in the City of Chicago, in said District and Division, before the Honorable Christian C. Kohlsaat, District Judge of the United States for said Northern District of Illinois, on Friday, the twenty-first day of December, being one of the days of the Regular December Term of said Court, in the year of our Lord one thousand nine hundred, and of our Independence the one hundred and twenty-fifth year. Pleas.

S. W. BURNHAM,
Clerk.

The United States Life Insurance Company, in the City of New York, a Corporation, etc.
vs.
Alice A. Cable, Administratrix of the Estate of Herman D. Cable, Deceased.
} In Chancery. 25,163.

Be it remembered that on this day to-wit: the eleventh day of May, A. D. 1899, came the complainant in said entitled cause by its solicitors and filed in the clerk's office of said court its Bond for Costs and Bill of Complaint, which said Bond and Bill are respectively in the words and figures following to-wit:

BOND FOR COSTS.

United States of America,
Northern District of Illinois,
Northern Division.
} ss.

Circuit Court.....Term A. D. 1899.

The United States Life Insurance Co.
vs.
Cable.
} In Equity.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the complainant of any costs ordered or adjudged to be paid by it I hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against said complainant.

Dated this 11th day of May, A. D. 1899.

JOSEPH H. STRONG,
Residence 2528 Indiana Ave. Chicago.

I, Joseph H. Strong, a surety on the annexed bond, being duly sworn, depose and say that I am worth in real estate situate in the Northern District of Illinois, the sum of four hundred dollars over and above my just debts and liabilities.

JOSEPH H. STRONG.

Sworn to and subscribed before me, this 11th day of May, 1899.

BUELL McKEEVER,
Notary Public.

(Seal)

(Endorsed) Filed May 11, 1899.

S. W. BURNHAM,
Clerk.

BILL OF COMPLAINT.

United States of America,
Northern District of Illinois,
Northern Division.

IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

To the Judges of the Circuit Court of the United States for the Northern District of Illinois:

The United States Life Insurance Company in the City of New York, a corporation duly organized under the laws of the State of New York, and a citizen of the State of New York, having its principal office in the City of New York, brings this, its bill of complaint, against Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, a citizen of the State of Illinois.

And thereupon your orator complains and states as follows:

1. Your orator for many years has been and now is engaged in the business of insuring lives throughout the United States, and it has for many years been and now is engaged in carrying on said business in the State of Illinois.

2. On or about the 16th day of January, 1899, said Herman D. Cable, a resident of Evanston, Illinois, made application in writing to your orator for insurance upon his life in the sum of fifty thousand dollars, which application was forwarded to the New York office of your orator, and in consideration thereof your orator, on or about the 17th day of February, 1899, executed its policy, numbered 94,082, upon the life of said Herman D. Cable, which policy

nt, agreed, in further consideration of eight hundred forty eight and fifty hundreths (848.50) dollars to be paid on delivery thereof, and a like sum to be paid on the 6th day of February in each and every year thereafter until ten (10) years' premiums should have been paid, and upon acceptance of satisfactory proofs of the death of said Cable within ten (10) years ending on the 6th day of February, 1909, that your orator would pay fifty thousand (50,000) dollars in thirty (30) consecutive annual installments of one thousand six hundred sixty-six and sixty-six hundredths (1,666.66) dollars each to the estate of said Cable, subject, however, to certain terms and conditions set forth in said policy and in the application therefor, one of which was that the policy should take effect only in case of the delivery of the policy during the sound health and insurable condition of the insured. A true copy of the said policy and of said application is hereto attached, marked Exhibit "A," and is hereby made a part hereof, and your orator begs leave to refer to the same for full and exact information as to the contents thereof.

3. Said policy on the life of said Herman D. Cable was after its execution sent by your orator to its agent in Chicago, Illinois, J. H. Strong, and on or about the 21st day of February 1899, said policy was tendered to said Herman D. Cable, who did not accept it, but refused to receive it and refused to pay the first premium thereon, saying that he wanted some further information about your orator.

4. At substantially the same time when said Herman D. Cable made his said application for insurance a similar application was made by a friend of his, named George S. Lord, also a resident of said Evanston. A similar policy of insurance upon the life of said Lord was issued by your orator, and on the 27th day of February, 1899, was delivered to said Lord, being actually handed him by one James F. McCabe, an attorney or insurance broker of Chicago, through whom said Lord and said Cable had by mutual arrangement respectively made their applications for insurance to your orator. On said last mentioned date said Lord learned from said McCabe that said Cable had had not taken his (said Cable's) policy, and said Lord thereupon requested said McCabe to obtain the policy written for said Cable and to bring it to him (said Lord) saying to said McCabe that he (said Lord) would take the policy for said Cable, and would pay the first premium upon it in behalf of said Cable. Thereupon and upon the same day said McCabe, complying with such request, obtained from your orator and delivered to said Lord the said policy upon the life of said Cable, and received from the said Lord payment for the premium due on said policy and said premium was duly received by your orator.

5. Your orator is informed and believes, and therefore states the fact to be, that on Friday evening, the 24th day of February, 1899, the said Herman D. Cable became ill; that during the following night or the next day his illness was diagnosed by attending physicians as pneumonia, and his condition was then regarded as serious by such physicians; that on Sunday, the 26th day of February, 1899, the life of said Herman D. Cable was despaired of by his physicians and family; and that on Thursday, March 2nd, 1898, Herman D. Cable died as a result of acute pneumonia.

6. Your orator is informed and believes, and therefore states the fact to be, that said Lord was well aware of the serious physical condition of the said Heaman D. Cable on Sunday, February 26th, 1899, or perhaps prior thereto, and was aware of the fact that said Cable was believed by his physicians to be suffering from pneumonia; that on the morning of Monday, February 27th, 1899, and before said Lord had seen McCabe on that day as above stated, the said Lord visited or communicated with the family of the said Cable; that said Lord procured the delivery to him of the said policy upon the life of said Herman D. Cable in the afternoon of said Monday, February 27th, 1899, with full knowledge of the dangerous illness of said Cable, and with full knowledge of the stipulation in the policy and in the application that the policy should take effect only upon payment of the first premium and upon its delivery during the sound health and insurable condition of said Cable and with full knowledge that in the then critical condition of the said Cable, your orator would not, if he knew the facts, deliver the said policy issued upon the life of said Cable, and with the wrongful intent and purpose of having said policy become immediately effectual for the benefit of the estate of said Cable in case said Cable's illness should terminate fatally.

7. Your orator avers that until after the death of said Herman D. Cable it had no knowledge of his said illness; that said illness was not made known to it, but was purposely and willfully concealed from it; and that had it known of his condition it would not have delivered said Cable policy.

8. Your orator is informed and believes, and therefore states the fact to be, that the said premium which said Lord paid upon the policy of said Cable was paid with the funds of said Lord and not with the funds of said Cable, that said Cable had never authorized said Lord to accept said policy and pay for the same and did not during his lifetime ratify such action; that said Lord was not an agent of said Cable for the purpose of receiving and paying the premium upon said policy; that the procuring of said policy by said Lord was not a delivery to the said Cable; and that the procur-

ing of said policy by said Lord and its delivery by him to said Alice A. Cable individually, did not under the circumstances herein shown create an effectual contract against your orator in respect to the insurance specified in said policy. Your orator avers that a deliberate fraud was practiced upon your orator in obtaining the delivery of said policy to said Lord and *no obligation* arose on the part of your orator to the estate of said Cable under said policy.

9. Your orator is informed and believes, and therefore states the fact to be, that on or about the 16th day of March, 1899, the defendant, Alice A. Cable was appointed administratrix of the estate of said Herman D. Cable, deceased, and that said policy, numbered 94,082, on the life of said Herman D. Cable, is now in the possession of said administratrix. Said administratrix has filed with your orator proofs of death of said Herman D. Cable and has requested payment to her of the commuted value of the unpaid installments of one thousand six hundred sixty-six and sixty-six hundredths (1,666.66) dollars each, specified in said policy, being the lump sum of thirty thousand (30,000) dollars, but your orator is informed and believes, and therefore states, that the said administratrix has no authority to elect to receive the commuted values of such installments. Prior to the filing of this bill, the amount of said premium paid by said Lord with lawful interest thereon, was offered and tendered to said Lord, and to said administratrix, in lawful money of the United States of America, but was refused by them. Your orator hereby offers to pay said sum of eight hundred forty-eight and fifty hundredths (848.50) dollars with lawful interest thereon to said administratrix, or to said Lord, as the court shall direct.

10. Your orator avers that the said policy of insurance upon the life of said Herman D. Cable, deceased, is not a valid and existing contract or obligation against your orator because it was never delivered to said Cable nor received by him and said Cable never paid the first premium thereon, and because it was procured from your orator professedly on behalf of said Cable by imposition and fraud, as hereinbefore stated; that your orator never authorized the delivery of said Cable policy through said Lord under the conditions existing when said policy was delivered to said Lord, that the possession of said policy by said administratrix and her claim thereunder constitute a wrong and an injury to your orator, which threaten to involve your orator in numerous suits to recover from time to time the consecutive annual installments stated in said policy to be payable thereunder, and for which your orator has no adequate and complete remedy at law; that an action at law has already been threatened upon said policy unless its commuted value is promptly paid; and that the premises considered this court

should take jurisdiction in the matter, should restrain said administratrix from bringing any action at law on said policy, and should decree that said policy be cancelled and surrendered and delivered up to your orator.

In consideration whereof, your orator prays that said Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, who is hereby made a defendant to this bill, may be required to make a full, true and perfect answer to all the allegations herein; that said policy of insurance numbered 94,082, issued by your orator upon the life of said Herman D. Cable may be declared null and void by the Court and may be cancelled; that said defendant may be required to produce said policy and to surrender the same to be canceled under the order of this court; that an injunction may be issued restraining the said defendant from prosecuting any action at law on said policy until so cancelled and surrendered; and that your orator may have such other and further relief in the premises as the circumstances may require and to your honor shall seem meet.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this court directed to the defendant, Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased, requiring her to appear and answer this bill.

And may it also please your honors to grant forthwith unto your orator the people's writ of injunction to be directed to said defendant, restraining her from prosecuting any action at law against your orator to recover any or all the moneys specified in said policy until the further order of this court.

And your orator will ever pray, etc.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK.
By ISHAM, LINCOLN & BEALE,
Its Solicitors.

ISHAM, LINCOLN & BEALE,
Solicitors and of counsel.

State of Illinois, } ss.
County of Cook. }

Joseph H. Strong, being first duly sworn says that he is the general agent for Illinois of the United States Life Insurance Company in the City of New York, complainant in the foregoing bill of complaint, and as such is authorized to make this affidavit in its behalf; that he has read the said bill and knows the contents thereof; and that the same is true except as to those allegations which are therein stated to be made upon infomation and belief, and as to those he believes said bill to be true. Affiant further says that he believes that an action at law will be presently commenced against said company by said administratrix upon said policy unless an injunction is issued in said cause restraining such action.

JOSEPH H. STRONG.

Subscribed and sworn to before me this 11th day of May, 1899.

FREDERICK MERRITT,
Notary Public.

(Seal)

(Endorsed) Filed May 11, 1899.

S. W. BURNHAM,
Clerk.

On the same day, to-wit, the eleventh day of May, 1899, a writ of subpœna issued out of the Clerk's office directed against the defendant in said entitled cause, which said writ together with the memorandum thereto attached and the Marshal's return thereon endorsed is in the words and figures following, to-wit:

CHANCERY SUBPŒNA.

United States of America,
Northern District of Illinois, } ss.
Northern Division

The United States of America, to Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased, Greeting:

We command you, that you appear before our Judges of our Circuit Court of the United States of America, for the Northern District of Illinois, at Chicago, in the Northern Division of said District, on the first Monday in the month of June next, to answer the bill of complaint of the United States Life Insurance Company, in the City of New York, a corporation, etc., this day filed in the Clerk's office of said court, in said city of Chicago, then and there

to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Northern District of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this 11th day of May, in the year of our Lord one thousand eight hundred and ninty-nine, and of our independence the 123rd year.

S. W. BURNHAM,
Clerk.

(Seal)

Memorandum.

The above named defendant is notified that unless it shall enter its appearance in the clerk's office of said court, at Chicago, aforesaid, on or before the day to which the above writ is returnable, the complainant's bill be taken against it as confessed and a decree entered accordingly.

S. W. BURNHAM,
Clerk.

Marshal's Return.

I have served this writ within my district upon the within named Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, by personally delivering to her a true copy of this writ, at her home, in Evanston, Ill., at 5:30 o'clock P. M., May 11th, 1899.

JOHN C. AMES,
U. S. Marshal.
By GEO. Q. ALLEN,
Deputy.

(Endorsed) Filed May 12, 1899.

S. W. BURNHAM,
Clerk.

On the same day, to-wit: the eleventh day of May, 1899, there was filed in the clerk's office of said court a certain motion for preliminary injunction, which said motion is in words and figures following, to-wit:

MOTION FOR PRELIMINARY INJUNCTION.

United States of America,
Northern District of Illinois, } ss.
Northern Division.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Northern District of Illinois.

The United States Life Insurance Company
vs.
Alice A. Cable, Administratrix of The Estate of Herman D. Cable, deceased. } In Equity.

The complainant in this cause now moves the court for an injunction, as prayed in the bill of complaint, and for an immediate restraining order until such injunction shall be issued.

THE UNITED STATES LIFE INSURANCE COMPANY,
By ISHAM, LINCOLN & BEALE,
Its Solicitors.

(Endorsed) Filed May 11, 1899.

S. W. BURNHAM,
Clerk.

On the same day, to-wit, the eleventh day of May, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry, to-wit:

rder 1899.

ORDER OF MAY 11, 1899.

The United States Life Insurance Company
vs.
Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased.
} 25163.

On the bill of complaint this day filed in the above entitled cause, and upon motion of the complainant, it is ordered that the defendant show cause at the court rooms of this court in Chicago, Illinois, on the 14th day of June, 1899, at ten o'clock in the forenoon, before the Honorable Christian C. Kohlsaat why a temporary injunction should not issue against her, according to the prayer of the bill, and that until the hearing and decision of the motion for such injunction on which the foregoing order is made, and until the further order of this court, the defendant, her agents and attorneys, be and they are hereby enjoined and restrained from prosecuting any action at law against the complainant herein to recover any or all the moneys specified in the policy of insurance in said bill of complaint mentioned.

ed And on, to-wit, the 14th day of June, 1899, there was filed in the office of the Clerk of said Court the Demurrer of defendant to Complainant's Bill of Complaint, which demurrer is in the following words and figures, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

United States Life Insurance Company,
vs.
Alice A. Cable, Administratrix.

The demurrer of Alice A. Cable, as administratrix of the estate of Herman D. Cable, deceased, defendant, to the Bill of Complaint of the United States Life Insurance Company, complainant:

This defendant by protestation, not confessing nor acknowledging all or any of the matters and things in the said Bill of Complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to the said bill

and for cause of demurrer shows: That the complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to any discovery or relief from or against this defendant touching the matters contained in the said bill, or any of such matters.

And for a further cause of demurrer, this defendant shows that the complainant is not entitled to sustain said bill for the reason that it has a full, complete and adequate remedy at law.

Wherefore this defendant demurs to the said bill and to all matters and things therein contained and prays the judgment of this honorable court whether she shall be compelled to make any further or other answer thereto and prays to be dismissed with her reasonable costs in this behalf sustained.

H. H. C. MILLER,
F. S. SHAW, and
W. S. OPPENHEIM,
Solicitors for Defendant.

I certify that in my belief the foregoing demurrer of Alice A. Cable, as administratrix of the estate of Herman D. Cable, deceased, defendant to the bill of complaint of the United States Life Insurance Company is well founded in law and proper to be filed in the above cause.

H. H. C. MILLER,
F. S. SHAW, and
W. S. OPPENHEIM,
Solicitor for Defendant.

United States of America, }
Northern District of Illinois. } ss.

Alice A. Cable, defendant, on oath says that she has read the foregoing demurrer to the Bill of Complaint of the United States Life Insurance Company in this suit and that the same is not interposed for the purpose of delaying the said suit or other proceedings therein.

ALICE A. CABLE.

Subscribed and sworn to before me this 13th day of June, A. D. 1899.

.....
Notary Public.

(Endorsed) Filed June 14, 1899.

S. W. BURNHAM,
Clerk.

Afterwards to-wit: on the thirtieth day of June, 1899, in the December term of said Court, 1898, in the record of proceedings thereof in said entitled cause before the Honorable Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

ORDER OF JUNE 30, 1899.

United States Life Insurance Company, in the City of New York,
vs.
Alice A. Cable, Administratrix. } 25163.

On motion of the solicitors for the complainant in this cause, leave is hereby granted to said complainant to file herein instanter an amended and supplemental bill of complaint; and on motion of the solicitors for the defendant, it is further ordered that the demurrer heretofore filed to the original bill stand as filed to said amended and supplemental bill.

On the same day, to wit: the thirtieth day of June, 1899, came the complainant in said entitled cause by its solicitors and by leave of court first had and obtained filed in the clerk's office of said court its Amended and Supplemental Bill, which said Amended and Supplemental Bill is in the words and figures following, to-wit:

AMENDED AND SUPPLEMENTAL BILL.

United States of America,
Northern District of Illinois.
Northern Division.

IN THE CIRCUIT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

To the Judges of the Circuit Court of the United States for the Northern District of Illinois:

The United States Life Insurance Company of the City of New York, a corporation duly organized under the laws of the State of New York, and a citizen of the State of New York, having its prin-

cipal office in the City of New York, complainant in the original bill of complaint in this cause, by leave of court for that purpose first had and obtained, presents this, it amended and supplemental bill of complaint against Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased, a citizen of the State of Illinois. And thereupon your orator complains and states as follows:

1. Your orator for many years has been and now is engaged in the business of insuring lives throughout the United States; and it has for many years been and now is lawfully engaged in carrying on said business in the State of Illinois under proper license.

2. On or about the 16th day of January, 1899, said Herman D. Cable, a resident of Evanston, Illinois, made application in writing to your orator for insurance upon his life in the sum of fifty thousand dollars, which application was forwarded to the New York office of your orator, and in consideration thereof your orator, on or about the 17th day of February, 1899, executed its policy, numbered 94,052, upon the life of said Herman D. Cable, which policy agreed in further consideration of eight hundred forty-eight and fifty hundredths (848.50) dollars to be paid on delivery thereof, and a like sum to be paid on the 6th day of February in each and every year thereafter until ten (10) years premium should have been paid, and upon acceptance of satisfactory proofs of the death of said Cable within ten (10) years ending on the 6th day of February, 1909, that your orator would pay fifty thousand (50,000) dollars in thirty (30) consecutive annual installments of one thousand six hundred sixty-six and sixty-six hundredths (1,666.66) dollars each, to the estate of said Cable, subject, however, to certain terms and conditions set foath in said policy, and in the application therefor, one of which was that the policy should take effect only in case of delivery of the policy during the sound health and insurable condition of the insured. A true copy of the said policy and of said application is attached, as "Exhibit A" to the original bill of complaint in this cause, and your orator begs leave to refer to said exhibit for full and exact information as to the contents of said policy and said application.

3. Said policy on the life of said Herman D. Cable was after its execution sent by your orator to its agent in Chicago, Illinois, Joseph H. Strong, and on or about the 21st day of February, 1899, said policy was tendered to said Herman D. Cable, who did not accept it, but refused to receive it, and refused to pay the first premium thereon, saying that he wanted some further information about your orator.

4. At substantially the same time when said Herman D. Cable made his application for insurance, a similar application was made by a friend of his, named George S. Lord, also a resident of said

Evanston. A similar policy of insurance upon the life of said Lord was issued by your orator and, on the 27th day of February, 1899, was delivered to said Lord, being actually handed him by one James F. McCabe, an attorney and insurance broker of Chicago, through whom said Lord and said Cable had by mutual arrangement respectively made their applications for insurance to your orator. On said last mentioned date said Lord learned from said McCabe that said Cable had not taken his (said Cable's) policy, and said Lord thereupon requested said McCabe to obtain the policy written for said Cable and to bring it to him (said Lord) saying to said McCabe that he (said Lord) would take the policy for said Cable and would pay the first premium upon it in behalf of said Cable. Thereupon, and upon the same day, said McCabe, complying with such request, obtained from your orator and delivered to said Lord, the said policy upon the life of said Cable and received from the said Lord payment for the premium due on said policy and said premium was duly received by your orator.

5. Your orator is informed and believes, and therefore states the fact to be, that on Friday evening, the 24th day of February, 1899, the said Herman D. Cable became ill, that during the following night or the next day his illness was diagnosed by attending physicians as pneumonia, and his condition was then regarded as serious by such physicians; that on Sunday, the 26th day of February, 1899, the life of said Herman D. Cable was despaired of by his physicians and family, that on Thursday, March 2nd, 1899, said Herman D. Cable died as a result of acute pneumonia.

6. Your orator is informed and believes, and therefore states the fact to be that said Lord was well aware of the serious physical condition of the said Herman D. Cable on Sunday, February 26th, 1899, or perhaps prior thereto, and was aware of the fact that said Cable was believed by his physicians to be suffering from pneumonia; that on the morning of Monday, February 27th, 1899, and before said Lord had seen said McCabe on that day as above stated, the said Lord visited or communicated with the family of the said Cable; that said Lord procured the delivery to him of the said policy upon the life of said Herman D. Cable, on the afternoon of said Monday, February 27th, 1899, with full knowledge of the dangerous illness of said Cable, and with full knowledge of the stipulation in the policy and in the application that the policy should take effect only upon payment of the first premium and upon its delivery during the sound health and insurable condition of said Cable, and with full knowledge that in the then critical condition of the said Cable, your orator would not, if it knew the facts, deliver the said policy issued upon the life of said Cable, and with the

wrongful intent and purpose of having said policy become immediately effectual for the benefit of the estate of said Cable in case said Cable's illness should terminate fatally.

7. Your orator avers that until after the death of said Herman D. Cable it had no knowledge of his said illness; that said illness was not made known to it, but was purposely and wilfully concealed from it; that had it known of his condition it would not have delivered said Cable policy; and that your orator never authorized the delivery of said Cable policy through said Lord under the conditions existing when said Lord obtained said policy.

8. Your orator is informed and believes, and therefore states the fact to be, that the said premium which said Lord paid upon said policy on the life of said Cable was paid with the funds of said Lord and not with the funds of said Cable, that said Cable had never authorized said Lord to accept said policy and pay for the same, and did not during his lifetime ratify such action; that said Lord was not an agent of said Cable for the purpose of receiving and paying the premium upon said policy; that the procuring of said policy by said Lord was not a delivery to the said Cable; and that the procuring of said policy by said Lord and its delivery by him to said Alice A. Cable individually did not under the circumstances herein shown create an effectual contract against your orator in respect to the insurance specified in said policy. Your orator avers that a deliberate fraud was practiced upon your orator in obtaining the delivery of said policy to said Lord, and that no obligation arose, or exists on the part of your orator to said administratrix, or to the estate of said Cable, under said policy.

9. Your orator is informed and believes, and therefore states the fact to be, that on or about the 16th day of March, 1899, the defendant, Alice A. Cable, was by the Probate Court of Cook County, Illinois, appointed Administratrix of the estate of said Herman D. Cable, deceased, and that said policy, numbered 94,082, on the life of said Herman D. Cable is now in the possession of said administratrix. Said administratrix has filed with your orator proofs of the death of said Herman D. Cable, and has requested payment to her of the commuted value of the unpaid installments of one thousand, six hundred sixty six and sixty six hundredths (1,666.66) dollars each, specified in said policy, being the lump sum of thirty thousand (30,000) dollars, but your orator is informed and believes, and therefore states, that the said administratrix has no authority, without the direction of said Probate Court, to elect to receive the commuted value of such installments, and that no direction respecting such an election has been given to said administratrix by said Probate Court. Subsequent to the making of said request for the payment of said commuted value, and in the morning of the same day, in which your orator filed its original bill

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in this cause, said administratrix, through one of her attorneys, made a demand upon your orator, at its place of business in said city of New York, for the payment to her of the first installment of insurance money expressed to be payable in said policy, but your orator declined to comply with said demand and to make such payment.

Thereupon, later in the forenoon of the same day, and about an hour or an hour and a half, before the filing of your orator's said original bill said administratrix began in the Superior Court of Cook County an action at law against your orator for the commuted amount of said policy of insurance, laying the ad damnum at fifty-five thousand (55,000) dollars, and caused a summons to be issued in said action, which summons, your orator states as supplemental matter to said original bill, was served upon said Strong, the agent of your orator, on the 15th day of May, 1899 And your orator further states as supplemental matter to said original bill, that a summons out of this court upon said original bill, was served upon said administratrix upon the same day in which original bill was filed, towit: on the 11th day of May, 1899.

10. Your orator further avers that the constitution and laws of the United States of America confer upon your orator the right to remove into this court said action at law so begun against your orator; that, on the other hand, the State of Illinois by legislative enactment has sought to prevent the removal to this court by insurance companies of actions similar to said action so begun by said administratrix, and has practically destroyed such right or made its exercise impracticable, by providing in substance, that an insurance company shall forfeit and lose its right to do business in the State of Illinois upon removing any such action into this court; that by removing said action to this court your orator might lose its right to transact business in the State of Illinois, and would certainly become involved in serious controversy with said State respecting the transaction of any subsequent business by your orator in said State; that the laws of said State upon certain questions of general insurance law, as interpreted by its highest legal tribunal, and applicable to the facts in this case, are somewhat different from the laws of the United States as interpreted by the Federal courts, upon the same questions, and from the standpoint of the laws of the United States, are unduly and erroneously adverse to insurance companies; that your orator is entitled to an application of the law according to the decisions of the Federal courts; and that under the facts and circumstances hereinbefore set forth in this bill, your orator is without a due and proper remedy at law in respect to the claim of said administratrix under said policy of insurance, but is without any remedy at law whatever in this court.

11. Your orator further avers that if it is correct in its under-

standing as to the lack of authority on the part of said administratrix to make an election for the payment of the commuted amount expressed to be payable by said policy, said administratrix has no right at the present time to sue for anything further than the first installment expressed to be payable in said policy, and may at any time bring an action at law against your orator for said first installment; that on account of the number of cases pending at law in the courts of the State of Illinois in said Cook County, and the established practice requiring contested actions (with a certain exception not natural here) to be tried in the order of their commencement, a contested action at law cannot ordinarily be reached for trial in said State courts for more than a year after its commencement, and frequently for a much longer time; that your orator is liable to have an action at law for said first installment brought against it in one of said State courts at any time by said administratrix; that if said administratrix should hereafter bring such an action at law for said first installment in one of said State courts, a year or more would elapse in the natural course of things before it could be brought to trial; that before the termination of any such action for said first installment another installment would be claimed to be due under said policy, and your orator would be liable to an action therefor; that in the event of a judgment adverse to your orator in any such action for the first installment, and of an appeal by your orator from such judgment to the Supreme Court of Illinois, several years would probably elapse before a final determination of the rights and obligations of your orator could be had, and in the meantime, pending such final determination, subsequent installments would be claimed to be due, and your orator would be subject to successive and repeated actions for such accruing installments; that in the meantime, pending such final determination, and even pending the trial of said existing action at law in the Superior Court of Cook County, your orator is liable to be deprived of the loss of important testimony in its behalf through the possible death of said McCabe, inasmuch as there is no provision of law in the state of Illinois under which the deposition of said McCabe may be taken before trial; and that said McCabe is the only witness by whom your orator can prove certain of the material facts hereinbefore set forth.

12. Prior to the filing of said original bill, the amount of said premium paid by said Lord, with lawful interest thereon, was offered and tendered by your orator to said Lord, and to said administratrix, in lawful money of the United States of America, but was refused by them. Your orator hereby offers to pay said sum of eight hundred forty eight and fifty hundredths (848.50) dollars, with lawful interest thereon, to said administratrix, or to said Lord, as the court shall direct for the cancellation and surrender of said policy.

13. The premises considered, your orator avers that said policy of insurance upon the life of said Herman D. Cable, deceased, is not a valid and existing contract or obligation against your orator, that the possession of said policy by said administratrix, and her claim set up thereunder, constitute a wrong and an injury to your orator for which your orator has no plain and adequate and complete remedy at law, and particularly has no such remedy in this court; that your orator is entitled to have said policy of insurance cancelled and surrendered to your orator and that this court should take jurisdiction in the matter, should restrain said administratrix from prosecuting her said pending action at law, and from bringing or prosecuting any other action at law on said policy, and should decree that said policy be cancelled and surrendered to your orator.

In consideration thereof, and to the end that your orator may have that relief which it can obtain only in a court of equity, and that the said Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, who is hereby made a defendant to this bill, may be required to answer the premises, but not under oath, an answer under oath being hereby expressly waived, as it was intended to be in said original bill, your orator now prays that said policy of insurance, numbered 94,082, purporting to insure the life of said Herman D. Cable may be declared null and void by the court and may be cancelled; that said defendant may be required to produce said policy and surrender the same to be cancelled under the order of this court; that said defendant may be enjoined and restrained from further prosecuting her said pending action at law on said policy, and from bringing or prosecuting any other action at law against your orator upon said policy; and that your orator may have such further or other relief in the premises as the circumstances may require and as to your honors shall seem meet.

May it please your honors to grant unto your orator a writ of subpœna, issuing out of and under the seal of this court, directed to the defendant, Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased, or to enter a rule in this cause requiring said defendant to appear and answer this bill.

And may it also please your honors to grant forthwith unto your orator a temporary injunction to be directed to said defendant, restraining her as above prayed until the further order of this court.

And your orator will ever pray, etc.

UNITED STATES LIFE INSURANCE
COMPANY IN THE CITY OF NEW YORK,
By ISHAM, LINCOLN & BEALE,
Its Solicitors.

ISHAM, LINCOLN & BEALE,
Solicitors and of Counsel.

State of Illinois, } ss.
County of Cook. }

Joseph H. Strong, being first duly sworn, says that he is the general agent for Illinois of the United States Life Insurance Company, in the City of New York, complainant in the foregoing bill of complaint, and as such is authorized to make this affidavit in its behalf; that he has read the above bill and knows the contents thereof; and that the same is true except as to those allegations which are therein stated to be made upon information and belief, and as to those, he believes said bill to be true.

JOSEPH H. STRONG.

Subscribed and sworn to before me this 29th day of June, A. D. 1899.

FREDERICK MERRITT,
Notary Public.

(Seal)
(Endorsed) Filed June 30, 1899.

S. W. BURNHAM,
Clerk.

And on the same day, to-wit: the thirtieth day of June, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry, to-wit:

DECREE OF DISMISSAL, JUNE 30, 1899.

United States Life Insurance Company
In the City of New York
vs.
Alice A. Cable, Administratrix.
} In Chancery.

This cause coming on now to be heard upon the application of the complainant for a temporary injunction against the defendant, as prayed for in the amended and supplemental bill of complaint, and upon the order heretofore made herein, temporarily restraining the defendant, as therein set forth, and directing the defendant to show cause why a temporary injunction should not issue against her, as prayed for by the complainant and upon the demurrer of the defendant to the amended and supplemental bill; and the court having heard arguments of counsel, and being now fully advised in the premises,

It is ordered that complainant's application for a temporary injunction be denied; that said restraining order be vacated and set aside, and that said demurrer be sustained, and the complainant elected to stand by its said amended and supplemental bill of complaint. It is further ordered, adjudged and decreed that said amended and supplemental bill of complaint be, and is hereby dismissed at Complainant's cost for want of equity.

Afterwards, to-wit, on the 10th day of July, 1899, the United States Life Insurance Company, by its solicitors, filed in the clerk's office of said court its Petition for Appeal, Assignment of Errors, which appeal was allowed upon filing Bond on Appeal.

And on to-wit: the third day of February, 1900, in the December term of said Conrt, 1899, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

ORDER OF FEBRUARY 3, 1900.

The United States Life Insurance Company of New York,
vs.
Alice A. Cable, Administratrix of Herman D. Cable, deceased.
} 25163.

Now on this day, comes the complainant by Messrs. Isham, Lincoln and Beale, its solicitors and by leave of court file the Mandate from the United States Circuit Court of Appeals for the Seventh Circuit reversing the judgment of dismissal heretofore entered herein with costs. And thereupon on motion of said solicitors, it is ordered that the complainant have and recover of the defendant, the costs herein to be taxed, occasioned by said appeal, the same to be paid in due course of administration of said estate.

And it is further ordered that this cause be redocketed, and the defendant is hereby ruled to further plead, answer or demur to the amended bill of complaint herein within ten days.

(And on the same day to-wit: the third day of February, 1900, there was filed in the clerk's office of said Court a certain Mandate from the Circuit Court of Appeals for the Seventh Circuit. Which Mandate is not copied.)

And afterwards to-wit: on the 13th day of February, 1900, there was filed in the clerk's office of said Court a certain answer by defendant, in words and figures following to-wit:

Feb.

ANSWER OF DEFENDANT.

Filed Feb. 13, 1900.

United States of America,
Northern District of Illinois,
Northern Division.

IN THE CIRCUIT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

United States Life Insurance Company of the City of New York,
vs.
Alice A. Cable, administratrix of the Estate of Herman D. Cable, Dec'd.

The answer of Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, to the amended and supplemental bill of complaint of the United States Life Insurance Company of the City of New York, the complainant:

This defendant, reserving to herself all right of exception to the said amended and supplemental bill of complaint, for answer thereto says, that she admits that the complainant is a corporation duly organized under the laws of the State of New York, and a citizen of the State of New York, and has been for many years last past, and is now, engaged in the business of insuring lives throughout the United States, and has been for many years and now is lawfully engaged in carrying on said business in the State of Illinois under proper license.

Defendant further admits that on or about the 16th day of January, 1899, Herman D. Cable, a reident of Evanston, in the State of Illinois, and a citizen of the State of Illinois, at the City of Chicago, Illinois, made application in writing to the complainant for insurance upon his life in the sum of $50,000 through one James F. McCabe, who solicited said application from said Cable as an agent

of complainant, and that said McCabe caused such application to be forwarded to the New York office of the complainant, and that in consideration thereof the complainant did execute its policy No. 94,082 upon the life of said Herman D. Cable, which policy agreed in further consideration of $848.50, to be paid upon delivery thereof, and a like sum to be paid on the 6th day of February in each and every year thereafter, until ten premiums should be paid, and upon the acceptance of satisfactory proofs of the death of said Cable within ten years, ending on the 6th day of February, 1909, that complainant would pay $50,000 in thirty consecutive annual installments of $1,666.66 each to the estate of said Cable, subject, however, to certain terms and conditions set forth in said policy, and that one of the conditions contained in said application was that the policy should take effect only upon payment of the first premium and delivery of the policy during the sound health and insurable condition of said Cable, and that a true copy of said policy and of said application is attached as Exhibit "A" to the complainant's original bill of complaint filed in this cause.

Answer Feb. 1

Defendant further answering admits that said policy on the life of said Herman D. Cable was after its execution, sent to the City of Chicago, but to which particular agent of the complainant in said city this defendant is not advised, except as she is informed by the bill of complaint filed herein, and defendant further admits that on or about the 21st day of February, 1899, said policy was tendered by said James F. McCabe, as agent of the complainant, to said Herman D. Cable, and that at this particular time said Cable declined to take up the matter of said policy with said McCabe and pay the premium thereon, for the reason that he was then too busy to examine the policy and see whether it was the same in its terms and conditions as represented when his application was taken, and for the further reason that he desired to confer with his close and intimate friend, Mr. George S. Lord, who had made an application for insurance through the same agent in the same company, and to whom a policy had also been issued, but had not yet been delivered.

Defendant further answering alleges that although said application was made at the solicitation of said agent on or about January 21, 1899, and was afterwards duly accepted by said complainant and a policy issued thereon, dated February 6, 1899, said policy was not tendered to said Cable for acceptance as above stated, until on or about February 21, 1899, and that said Cable was at all times during said period in good health and in insurable condition, and was ready to accept said policy and pay the premium thereon on presentation thereof, provided it was the same in terms and conditions as represented by said agent when his application for the same was taken.

Defendant further answering says that it had been agreed between said Cable and said Lord, that they would, both acting together, either accept or reject the policies so issued to them as aforesaid, and that said Lord was to satisfy himself as to whether the policies so issued were in accordance with the representations made by said McCabe, when the said applications were taken, and that upon the same day that said policy was so presented to said Cable, the policy issued in favor of said Lord was also presented to him by said McCabe and was left with said Lord for the purpose of examining the same, to determine whether it was the policy agreed to be issued.

Defendant further alleges that on the evening of the day of the first presentation of said policy to said Cable, the said Cable went to said Lord and asked him if he had satisfied himself as to the said policy, and the said Lord replying in the affirmative, said Cable told said Lord that he was ready and willing to accept said policy and pay for the same, and that whenever he, the said Lord, was ready to take his policy, he, the said Lord, was authorized to accept his, the said Cable's policy, and pay the premium thereon.

Defendant further answering says that said Lord and said Cable were connected together by the closest ties of friendship, and were also interested together in various business enterprises, and were in almost daily communication with each other, and had been such friends and so interested in various business enterprises for many years prior to February, 1899, and that each was in the habit of acting for the other in matters in which they were mutually interested.

Defendant further answering admits that upon the evening of the 24th day of February, 1899, said Cable became ill, and that upon the following day his illness was diagnosed as a slight attack of pneumonia, but denies that upon the 26th day of February the life of said Cable was despaired of by his physicians and family, or that any such report was in circulation, but says, on the contrary, that on the 26th and on the 27th days of February, 1899, his illness was not considered as at all dangerous, but a speedy recovery of said Cable was confidently expected by his said family, and said Lord, and that no danger of death from said illness was at all apprehended by them, or either of them.

Defendant further answering admits that the said Lord was in daily communication with said Cable and his family during said illness, as had been his custom for many years prior thereto, but denies that he was informed that said Cable was in serious physical condition and that his death was expected from the disease which he then had, but says that on the contrary said Lord believed and was informed by the family of said Cable that he was not considered to be in a dangerous condition.

Defendant further answering admits that on the 27th day of February, 1899, said McCabe went to the office of said Lord for the purpose of ascertaining whether said Lord and said Cable would take said policies, and that he was then informed by said Lord that he, said Lord, was willing to take both of the policies, but that said Cable was then ill at his home in Evanston, and if said McCabe, with knowledge of this fact, desired to deliver said policies he would receive and pay for the same; that said McCabe then went from said office, and shortly after returned with the policy issued in favor of said Cable, and delivered the same to said Lord, well knowing and being informed of the true condition of said Cable, and that with such knowledge he received from said Lord the premiums upon both of said policies for the first year of the life of the same; that is, from the 6th day of February, 1899, until the 6th day of February, 1900.

Defendant further expressly denies that the illness of said Cable was not made known to the complainant, but was purposely and wilfully concealed from it, but on the other hand, defendant alleges that the true condition of said Cable was fully told and made known to the complainant prior to the delivery of said policy and the payment of the premium thereon.

Defendant further denies that said Lord was not authorized by said Cable to accept said policy and pay the premiums thereon, but on the contrary alleges that he was requested by the said Cable to so receive said policy and pay the first premium thereon when he, the said Lord, should take his policy.

Defendant further answering admits that the said Cable did on Thursday, March the 2d, 1899, depart this life, but denies that such death was occasioned by pneumonia, but was occasioned by heart failure, the result of sudden complications which arose a few hours before his said death, and which were not expected, or apprehended by his family or physicians until a short time before they occurred.

This defendant further answering admits that on or about the 16th day of March, 1899, she was by the Probate Court of Cook County, Illinois, duly and regularly appointed as administratrix of the estate of Herman D. Cable, deceased, and qualified and took upon herself the duties of such trust; and that she as such administratrix took possession of said policy upon the life of said Herman D. Cable, deceased, and has ever since been in possession of the same.

Defendant further admits that she filed with the complainant proofs of death of the said Herman D. Cable, and requested payment to her of the commuted value of the unpaid installments of said policy, being the sum of $30,000, as specified in said policy, and that said complainant refused and declined to pay the same; that there-

upon she instituted suit in the Superior Court of Cook County, Illinois, against the complainant in an action at law for the commuted value of said policy, to-wit, the sum of $30,000, and that such action was commenced some time prior to the filing of the original bill of complaint herein.

Defendant further says that it is her desire and intention to push to as speedy a conclusion as possible said suit so commenced by her, if permitted to do so by this court.

Defendant further answering says that she admits that before the complainant became entitled to do business in the State of Illinois it was required by the laws of the State of Illinois to file with the auditor of public accounts its written agreement to not remove or make application to remove into the United States Court any action or proceeding commenced in any of the state courts of said state upon any claim or cause of action arising out of any business transaction in fact done in said state and that such complainant did file such written statement and was granted a licence by said state to do business therein upon the basis of said agreement, and that it is further provided by the laws of the State of Illinois that should the complainant fail to keep its said agreement, then the authorities of said state have the right to and it is made their duty to revoke the license of the complainant to further do business in the State of Illinois, but this defendant denies that the laws of the State of Illinois, upon the question involved in this suit as interpreted by its highest legal tribunal, are different from the laws as interpreted by the Federal courts upon the same question, or that the laws of the state as enforced by the courts of the State of Illinois are erroneously adverse to insurance companies, but says that the same rule governing the rights of the parties to this suit is enforced both by the Federal and state tribunals, and that the complainant is entitled to set up as its defense in the suit brought against it by this defendant in the state courts the matters alleged in its said amended and supplemented bill, and that all of its rights will be as fairly protected in said state court as in the Federal court.

Defendant further answering denies that she has no authority as administratrix to make an election for the payment of the commuted amount expressed to be payable in said policy, but says that she has such authority, having made such election, and that there is no danger to the complainant that any other suit will be instituted by her for the various installments as provided for in said policy, and she denies that the complainant is liable to be deprived of the loss of important testimony by the possible death of said McCabe; and further denies that the complainant will be able to prove by said McCabe that said complainant had no knowledge of the illness

of said Cable at the time of the delivery of the policy by him and his reception of the premium thereon.

Defendant further answering admits that the complainant offered to pay to her the sum of $848.50 with interest thereon prior to the institution of this suit, and that she refused to accept the same, claiming that said policy was in full force and effect and that the complainant had no right to rescind its contract deliberately and fairly entered into.

Defendant further answering says that said contract is a valid and existing one, and that she is in possession of said policy as administratrix aforesaid, and that the complainant has an adequate and complete remedy at law by setting up in the suit brought by her the alleged facts set out in the amended and supplemental bill herein, and says that the allegations in the amended and supplemental bill of complaint as to the manner of the procurement of said policy are false and untrue, and denies that the complainant is entitled to have said policy of insurance canceled and surrendered, and further says that this court should not take jurisdiction of this matter, or restrain the defendant from prosecuting the said pending action at law.

And this defendant further answering denies that the complainant is entitled to the relief or any part thereof in the said amended and supplemental bill of complaint demanded, and prays the same advantage of this answer as if she had pleaded or demurred to the said amended and supplemental bill of complaint, and prays to be dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

ALICE A. CABLE,
Administratrix of the Estate of Herman D. Cable, deceased.
By H. H. C. MILLER,
F. S. SHAW,
W. S. OPPENHEIM,
Her Solicitors.

(Endorsed) Filed Feb. 13, 1900.

S. W. BURNHAM,
Clerk.

And afterwards to-wit: on the 21st day of March, 1900, in the December term of said Court, 1899, in the record of proceedings of said court in said entitled cause appears the following entry before the Hon. Christian C. Kohlsaat, District Judge.

ORDER OF REFERENCE.

Entered March 21, 1900.

IN THE CIRCUIT COURT OF THE UNITED STATES,

In and for the Northern District of Illinois.

United States Life Insurance Company,
vs.
Alice A. Cable, Administratrix, etc. } No. 25,163.

This cause coming on further to be heard upon motion of complainant's solicitors, it is ordered that said cause be referred to William M. Booth, Master in Chancery of this court, to take the evidence in said cause and to report the same to this court.

And on to wit the 26th day of March, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District judge appears the following entry to-wit:

United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased. } 25163.

On motion of complainant's solicitors, It is ordered that the complainant be and it is hereby allowed to file instanter, *nunc pro tunc* as of March 3, 1900, its general replication to the answer of defendant heretofore filed herein, without prejudice to the order of reference herein.

And on the same day to-wit: the 26th day of March, 1900, came the complainant by its solicitor and by leave of court first had and obtained files its replication nunc pro tunc as of March 3, 1900, which replication is in words and figures following to-wit:

REPLICATION OF COMPLAINANT.

Filed March 26, 1900.

United States of America, Northern District of Illinois. } ss.

IN THE CIRCUIT COURT OF UNITED STATES,

Northern District of Illinois.

United States Life Insurance Co. in the City of New York,
v.
Alice A. Cable, Adm'x of the estate of Herman D. Cable, deceased.
} In Chancery.

The Replication of United States Life Insurance Company in the City of New York, Complainant, to the answer of Alice A. Cable, Adm'x of the estate of Herman D. Cable, dec'd.

This Repliant, saving and reserving to itself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiences of the said answer of the said defendant, for replication thereunto says, that it will aver, maintain, and prove its Bill of Complaint to be true, certain, and sufficient in the law, to be answered unto; and, that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed, or denied, is true. All which matters and things this repliant is ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays, as in and by its said Bill it has already prayed.

ISHAM, LINCOLN & BEALE,
Solicitors for Complainant.

(Endorsed) Filed March 26, 1900.

S. W. BURNHAM,
Clerk.

And afterwards to-wit: on the 5th day of October, 1900, came William M. Booth, Master in Chancery to whom said cause had been referred to take proofs and report the same and files his report herein, together with objections thereto which are in words and figures following to-wit:

UNITED STATES CIRCUIT COURT.

For the Northern District of Illinois.

Northern Division.

In Chancery.

The United State Life Insurance Company, vs. Alice A. Cable, Administratrix, etc. } Bill. No. 25163.

MASTER'S REPORT.

To the Honorable the Judges of said Court:

The undersigned Master, to whom the above cause was referred by order entered therein on the 21st day of March, 1900, to take the evidence in the said cause, and report the same to this court, respectfully reports as follows:

That pursuant to said order of reference he caused the parties hereto to attend before him, by their respective solicitors, on the 27th day of March, 1900, and on various days subsequent thereto, and thereupon certain oral and documentary evidence was adduced on behalf of the parties hereto, and certain proceedings were had, all of which documentary evidence, together with a full, true and complete transcript and report of the said oral evidence and proceedings, is attached hereto and filed herewith, and constitute all of the evidence of every nature which was adduced before said Master at any of the hearings under the reference herein.

And thereupon, on the 26th day of September, 1900, oral arguments were made before the Master by counsel for the respective parties.

And the Master having heard and considered the evidence herein and the arguments of counsel, makes the following findings of facts herein:

I.

Master filed 1908

That the complainant is a corporation, duly organized under the laws of the State of New York, and a citizen of the State of New York, and has been for many years last past, and is now, engaged in the business of insuring lives throughout the United States, and has been for many years, and is now, lawfully engaged in carrying on said business in the State of Illinois under proper license; and that the defendant, Alice A. Cable, is a citizen of the State of Illinois, residing in the Northern District thereof. The business of the complainant in Chicago is in charge of a general manager for the States of Illinois and Wisconsin, who has supervision of the company's business, procuring applications or seeing that they are procured, collecting premiums, attending to the detail work, looking after disbursements, looking after losses and furnishing proofs, and who is the supreme authority in the State of Illinois in said company's business in all cases in the agency work, and is hereinafter called "general agent."

II.

That on or about the 16th day of January, 1899, Herman D. Cable, then a resident of Evanston in the State of Illinois, made application in writing to the complainant, through one James F. McCabe, for insurance upon his life in the sum of fifty thousand dollars, which application was forwarded to the New York office of the complainant, and in consideration thereof, the complainant, on or about the sixth day of February, 1899, executed its policy, numbered 94,082, upon the life of the said Herman D. Cable, which policy agreed, in further consideration of the sum of $848.50, to be paid on the delivery thereof, and a like sum to be paid on the sixth day of February in each and every year thereafter, until ten (10) years' premiums should have been paid, and upon the acceptance of satisfactory proofs of the death of the said Herman D. Cable within ten (10) years ending on the sixth day of February, 1909, that the complainant would pay fifty thousand dollars ($50,000) in thirty (30) consecutive annual installments of one thousand six hundred sixty-six and sixty-six hundredths dollars ($1,666.66) each to the estate of the said Herman D. Cable.

The written application for the said policy was by the terms of the policy made a part of the policy itself, and was signed by the said Herman D. Cable, and one of the provisions of the said application was as follows, viz.: "It is hereby declared and agreed

ort, * * * that the policy to be issued hereon shall take effect only upon payment or the first premium and delivery of the policy, during my lifetime, sound health and insurable condition"; and another provision thereof was as follows, viz.: "That only the president, together with the secretary or the actuary, shall have the power to alter or waive the policy, or any condition thereof."

III.

At the same time when Cable applied for the above policy, a similar application was made to the complainant for a similar $50,000 policy by George S. Lord, who was a neighbor and intimate friend of Cable, and interested with him in numerous business transactions, both being directors of the Bankers' National Bank, and members of the Evanston school board. Both of the said policies were issued at about the same time, and both were forwarded from the New York office of the complainant to its Chicago office, and were received at the latter office on or before the 20th day of February, 1899, and on the last named day they were turned over by the complainant's general agent at Chicago to one T. J. Finney.

IV.

The said T. J. Finney was a life insurance broker who was not regularly employed by the complainant or by any other company, but who had done business with the complainant through the said general agent, among other companies, for the past seven years, and had during the year 1898 procured other insurance on the life of the said Herman D. Cable in another company, which had lapsed in November, 1898. One James F. McCabe was also a life insurance agent or broker who, in January, 1899, had a contract of employment with the Equitable Insurance Company of New York, and who had no connection or business arrangement with the complainant, except through the said Finney, and was not known to the general agent of the complainant at Chicago in connection with the Cable policy until about the time when the application therefor was delivered to the complainant's general agent in Chicago, and was not personally known to said general agent until March 5, 1899. Upon the delivery of the said two policies to Finney, the gross amounts of the premiums due were charged against him by the complainant's general agent, and he subsequently paid to such general agent the amount due to the complainant out of such premiums.

V.

The applications of both George S. Lord and Herman D. Cable for insurance were obtained from them by the said McCabe, under an agreement with the said Finney, and when procured were delivered by him to Finney. After the two policies had been received by the complainant's general agent in Chicago and had been turned over by him to Finney as aforesaid, the latter in turn delivered them to the said McCabe, on the 21st day of February, 1899.

Thereupon, on the same day, McCabe called first at the office of Herman D. Cable, having both of the said policies with him, but the said Cable refused to accept his policy at that time, stating that he did not have time to look into the matter at the moment, but that he would be guided a good deal by what Mr. Lord said and did in the matter.

Afterwards, on the same day, McCabe called at Mr. Lord's office, found Mr. Lord very busy, and left his (Lord's) policy with him, together with a financial statement of the company, and told him that he might send him (McCabe) a check for it. On the same day McCabe returned the Cable policy to Finney.

VI.

On the 27th day of February, 1899, McCabe again called upon George S. Lord and asked for payment of the premium on his policy. Mr. Lord, thereupon, asked him if he also had the Cable policy with him. McCabe stated that he had not, but that he could get it in a few minutes, whereupon Mr. Lord told him to get it, and he (Lord) would pay him the amount of both premiums. McCabe then went at once to Finney's office, procured the Cable policy from Mr. Finney, and returned with it to Mr. Lord's office, and handed it to Mr. Lord, saying as he did so: "Is Mr. Cable all right?" or words substantially to that effect. There was a conflict as to what Mr. Lord said in reply, but the master is of the opinion that the reply was substantially as Mr. Lord stated in his testimony, viz: "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours."

Thereupon McCabe left the Cable policy with Mr. Lord, who already had his own policy, and Mr. Lord paid the premiums on both policies in currency, the premium on the Cable policy being eight hundred and forty-eight dollars and fifty cents ($848.50), and McCabe took the money to Mr. Finney, who subsequently paid to the complainant the amount due to it. Mr. Lord then took the Cable

policy to Evanston and delivered it to a member of Mr. Cable's family at the latter's house, in the evening of the same day.

The master finds that Lord had been authorized in advance by Herman D. Cable to accept and pay for the latter's policy in case he (the said Lord) decided to accept and pay for his own policy, and that the premium advanced by him was repaid to him after Cable's death by one of the relatives of the said Cable.

VII.

Immediately after delivering the said two policies to Lord, McCabe went to Cleveland, Ohio, and while there he received, on March 2d, 1899, a telegram from Finney, reading as follows:

"Cable died this morning, was sick when policy delivered. Company want policy back. Am non-committal pending hearing from you. Hame you any advice?" (See Complainant's Exhibit 3.)

McCabe thereupon returned to Chicago on March 3d, 1899, and on that day informed Mr. Lord, and also the latter's attorny, Mr. H. H. C. Miller, that the complainant company demanded the rereturn of the Cable policy.

VIII.

The master finds that on the 21st day of February, 1899, when the policy in question was first presented to Herman D. Cable and he refused to receive it, he was in sound health and insurable condition; that on the 24th day of February, 1899, he was taken ill with incipient pneumonia, and was attended by a physician in the early evening of that day, and was put under the care of a trained nurse the same evening; that his disease developed into a case of acute pneumonia, and that he was seriously ill with that disease and confined to his bed from the evening of the 24th day of February, 1899, until March 2, 1899, when he died. That on the 27th day of February, 1899, the said Herman D. Cable was seriously ill with acute pneumonia and was not in good health, and was not in insurable condition, and that this was well known to the said George S. Lord when he procured the delivery to himself of the Cable policy. and paid the premium thereon, but that he did not communicate such knowledge to the said McCabe any further than by making the statement to him which has been set forth hertofore in finding VI; and the master finds that the said Lord's statement that Cable had been sick for two or three days, but was no worse than he had

been during the last forty-eight hours, while it was substantially true at the time when it was made, was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or to lead him to suspect it.

IX.

The master further finds that up to the last day of the said Cable's illness, the said illness was not such as to be regarded by his physician and friends as necessarily fatal; that up to the day before his death his attending physician expected him to recover, and so informed his family; that the immediate cause of his death was heart failure, or collapse, which was the result of his illness, and which is one of the common features of pneumonia.

X.

The Master further finds that none of the general officers of the complainant company, residing in New York City, had any personal knowledge that the said Herman D. Cable was taken ill at any time after the application for the policy in controversy was made, and that none of them had any personal knowledge until after his death that he was ill at any time between the date of the application and the date of his death; and that neither the said Finney nor the said McCabe (excepting the statement made to him by Lord on the delivery of the policy), nor the general agent of the complainant at Chicago, nor the complainant itself, had any knowledge or information as to the said Cable's condition of health at any time between the date of the application for the policy in question and March 2, 1899—but in making this and all other findings, the Master expressly reserves the question as to whether the information conveyed by George S. Lord to McCabe was, or was not, such notice as to bind the complainant company and its representatives.

XI.

That on or about the 16th day of March, 1899, the defendant, Alice A. Cable, was by the Probate Court of Cook County duly appointed as administratrix of the estate of the said Herman D. Cable, deceased, and qualified, and took upon herself the duties of such

trust; and that as such administratrix the took possession of the said policy in controversy and has ever since been in possession of the same.

That as such administratrix she filed with the complainant proof of the death of the said Herman D. Cable, and requested payment to her of the commuted value of the unpaid installments of $1,666.66 each, specified in the said policy, being the lump sum of thirty thousand dollars ($30,000), and that the complainant refused to pay the same, and that the defendant herein brought her action at law against the complainant in the Superior Court of Cook County, Illinois, on May 11, 1899, to recover $30,000 upon the policy offered in evidence in this case, as the commuted value of such policy; that such action was begun by the filing of a præcipe and the issuance of a summons on said day, about an hour prior to the filing of the original bill herein; that such summons was placed in the hands of the sheriff of Cook County for service upon the defendant immediately upon its issuance, and prior to the filing of the original bill herein, but was not served upon the complainant herein until May 15, 1899, and that no direction to the sheriff to delay the service of summons was given by the plaintiff in said action at law, or her attorney, which action at law is still pending and has never been called for trial, but now stands number 148 upon the new calendar of Judge Chytraus, which said Judge began to call September 15, 1900.

XII.

The Master further finds that before the filing of the bill herein the complainant offered to pay to the defendant herein the amount of the first premium upon the policy in controversy, together with interest thereon, but such offer was refused by the said defendant, Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased.

XIII.

The Master further finds that there has been no evidence adduced before him showing or tending to show that any of the conditions of the policy in controversy have been waived by the president and secretary or actuary of the complainant, or any or either of them; and also finds that the general agent of complainant in Chicago never authorized either said McCabe or said Finney to waive any of the conditions thereof, and never waived any of them himself.

XIV.

That the said Herman D. Cable and George S. Lord, in the making of the application to the complainant and in the delivery of the policies and payment of the premiums thereon, had no dealings with any person other than the said James F. McCabe.

XV.

It was stipulated by counsel, and the Master finds, that the witness Allen B. Clayton, who testified before the Master on the hearing of this cause, died on or about the 15th day of September, 1900.

All of which is respectfully submitted.

WILLIAM M. BOOTH,
Master in Chancery of said Court.

Oct. 5, 1900.

The foregoing report having been submitted to counsel, certain objections, three in number, were filed thereto by counsel for the defendant, but the Master overruled such objections and each of them and files the same herewith and attached hereto.

WILLIAM M. BOOTH,
Master, etc.

OBJECTIONS OF DEFENDANT TO MASTER'S REPORT.

Filed October 5, 1900.

IN THE UNITED STATES CIRCUIT COURT.

Northern District of Illinois.

Northern Division.

United States Life Insurance Co. vs. Alice A. Cable, Administratrix. } Pending before Wm. M. Booth, Master in Chancery.

Objections taken by the above named defendant to the report of the Master in Chancery to whom this cause has been referred to take the proofs:

First. For that the Master has erroneously found that the statement made by George S. Lord to James F. McCabe as to the illness of Herman D. Cable was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it.

Second. For that the said Master has omitted to find that on the 27th day of February, 1899, it was the full belief of George S. Lord that said Cable was not dangerously sick and that he would shortly recover from his then illness.

Third. For that the said Master has omitted to find that the information conveyed by the said George S. Lord to said James F. McCabe was sufficient notice of the illness of Herman D. Cable, at and before the time of the delivery of the policy and the payment of the premium thereon.

In all of which particulars the said defendant objects to the said report, and submits that the same ought to be varied and altered.

H. H. C. MILLER,
F. S. SHAW and
W. S. OPPENHEIM,
Solicitors for Defendant.

The above objections, and each of them, are overruled this 5th day of October, 1900.

WILLIAM M. BOOTH,
Master, etc.

United States of America,
Northern District of Illinois. } ss.

IN THE

Circuit Court of the United States.

FOR THE NORTHERN DISTRICT OF ILLINOIS,

NORTHERN DIVISION.

UNITED STATES LIFE INSURANCE COMPANY, IN THE CITY OF NEW YORK,

vs.

ALICE A. CABLE, ADMINISTRATRIX OF THE ESTATE OF HERMAN D. CABLE, DECEASED.

IN CHANCERY.

No. 25,163.

TESTIMONY

Taken before William M. Booth, Master in Chancery of said Court, on Tuesday, the 27th day of March, 1900, and subsequent days, pursuant to the order of reference entered in said cause on the 20th day of March, 1900.

Present:

Gilbert E. Porter, Esq., and Buell McKeever, Esq., representing the complainant.

H. H. C. Miller, Esq., W. S. Oppenheim, Esq., and F. S. Shaw, Esq., representing the defendant.

And thereupon the complainant, to maintain the issues on its part, introduced the following evidence, to wit:

Deposition of James F. McCabe.

JAMES F. McCABE, produced as a witness in behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. Please state your full name, Mr. McCabe? A. James F. McCabe.

Q. Where do you reside? A. Chicago.

Q. How long have you lived in Chicago? A. Eight years.

Q. What is your business, Mr. McCabe? A. Life insurance agent.

Q. Are you at present attached to any life insurance company? A. I am.

Q. What company? A. The Washington, of New York.

Q. How long have you been engaged in that business? A. With the Washington of New York?

Q. Yes. A. About a year.

Q. Prior to that time what was your business? A. I was in the insurance business, and had a contract with the Equitable of New York.

Q. To what company, if any, were you attached about the 18th of January, 1899? A. I will say that I had a contract with the Equitable at that time, but had an application in for the agency of the Washington. My appointment came to the agency of the Washington about that time, so that the two contracts overlapped. I didn't want to give up one until I was sure of the other. There was no salary attached to the Equitable—it was merely a commission contract, so that I was doing no injustice to the Equitable in applying for a position with the Washington.

Q. Were you acquainted with Herman D. Cable in his lifetime? A. I was.

Q. Are you acquainted with George S. Lord? A. I am.

Q. And are you acquainted with his partner, Mr. Owen, of the firm of Lord & Owen? A. Yes sir.

Q. I will ask you if you had any relations with the United States Life Insurance Company, the complainant in this suit, at or before the 16th day of January, 1899? A. I hardly know how to answer the question directly, without saying I had connections with a man who had an agreement with Mr. Strong, who was the agent for the United States, and that is the only way that I had any connection with them; so if you consider that a connection I had a connection, and if not, then I had no connection.

Q. Now let us see what that connection was. Had you ever done any business with the United States Life Insurance Company, or for them, prior to the time, when, as I understand, you took the application of Mr. Lord for life insurance, some time in January 1899? A. I will say that simultaneously with Lord and Cable I was instrumental in getting two applications from men on the Board of Trade with the United States; that is, they were all pending at the same time, and through an independent broker who had an agreement as to commissions with Mr. Strong—a verbal agreement, as I understand it, with Mr. Strong, as to the commissions that he would receive when the business was turned in to Mr. Strong.

Q. That is, you took the applications for life insurance with the United States Life Insurance Company of a couple of Board of Trade men, some time in January 1899? A. About the same time; I can't say as to the exact dates; about the same time. They were all pending along about then.

Q. Was there any regular agency or relation between you and the United States Life Insurance Company; that is what I am trying to get at? A. None written; none with the agent of the company, none with the accredited agent of the company, Mr. Strong.

Q. I understand you to mean that what relation you had was merely in connection with these particular applications that you have spoken of? A. That was all. If you will allow me to qualify that one word to this extent, that it was not in particular to these applications; it was general, that I might have taken any other names at that moment, under that same agreement.

Q. The agreement you speak of is an agreement made with whom? A. Now, may I bring this man's name into the matter without—I was requested by him not to bring his name into the matter at all, if it was not necessary. If it is necessary I will very cheerfully give his name.

Q. Was he a sub-agent of the general agent of the company here? A. I don't know what his relationship is. All I know is that he was an independent broker. I was very careful not to give him. I asked him nothing at all. I don't know what his arrangement was with Mr. Strong, only that he said—he came to me—"Do you know where you can get some insurance? We want a lot of it." "Why," I said, "I can—"

Q. Mr. J. H. Strong was the general agent of the company in Chicago at that time, wasn't he? A. Yes sir.

Q. Now, please state whether or not you procured for Mr. George S. Lord and his partner Mr. Owen applications for any life insurance in January 1899? A. I did.

Q. Did you procure an application for a policy for each of those gentlemen? A. Yes sir.

Q. Do you remember about what time in January, 1899, that was, Mr. McCabe? A. About the middle of January.

Q. State whether or not that was before or after any transaction that you had with Mr. Herman D. Cable, deceased? A. Before.

Q. Now, you may state, Mr. McCable, what, if any, transaction you had with Mr. Herman D. Cable, deceased, in January, 1899, and how it was led up to? A. I asked Mr. Lord to give me an introduction to Mr. Cable. Mr. Lord gave me a card of introduction to Mr. Cable, his own personal card, on which he—his visiting card, on which he wrote the words, "Introducing Mr. James F. McCabe." He said, "Bring that down to Cable, I will telephone him," and when I got there—

Q. Did you go to see Mr. Cable with that card? A. Immediately.

Q. And did you see him? A. I did. Not directly. I sent in my card and he wanted to know my business, and he said he was very busy.

Q. Well, did you solicit Mr. Cable for a life insurance policy? A. Yes sir.

Q. Now please state whether or not you procured Mr. Cable's application for a life insurance policy, and the date of it, if you remember? A. I procured—I don't remember the exact date, but at that time. I wrote the date on it at that time.

Q. I call you attention to a policy of insurance which is produced here by counsel, on the life of Herman D. Cable, dated Februray 6th, 1899, issued by the United States Life Insurance Company, No. 94082, which contains a copy of the application. Please look at that and see if that refreshes your memory as to the date when you obtained Mr. Cable's application? A. Yes, it does.

Q. What was the date? A. The 16th of January.

Q. What year? A. 1899.

Q. That was an applicotion for insurance in the United States Life Insurance Company? A. It was.

Q. Mr. Cable signed the application on that day, did he? A. He did.

Q. Now, I think you have stated that previously to obtaining Mr. Cable's application of January 16th, 1899, you had obtained applications for policies in the same company from Mr. Lord and Mr. Owen? A. Yes sir; I will say, I am not so positive as to Mr. Owen as to the date; I had a talk with him and the agreement for it, but I had Mr. Lord's previous.

Deposition of James F. McCabe.

Q. Do you know whether Mr. Lord applied for the same kind of a policy as Mr. Cable? A. Yes, he did.

Q. The applications were in the same form and for the same kind of policy? A. The same; yes, sir.

Q. Now, after obtaining Mr. Cable's application on January 16th, 1899, what did you do with it? A. I brought it to the office of this independent broker and delivered it to him.

Q. Was that Mr. T. J. Finney? A. Yes, sir.

Q. He was the man, was he, with whom you had the arrangement about dividing the commissions on the insurance which you procured and brought there to him? A. Yes sir.

Q. Now, did you take Mr. Lord's application to Mr. Finney also? A. Yes sir.

Q. And delivered Mr. Lord's application and Mr. Cable's to Mr. Finney? A. Yes sir.

Q. Was the policy which Mr. Lord applied for through you for $50,000, the same as the one which Mr. Cable applied for? A. $50,000 was the face of the policy—an installment policy.

Q. Now, after you delivered Mr. Cable's application for the policy to Mr. Finney, when did you next have anything particular to do in connection with the matter? A. About the 21st of January.

Q. Don't you mean February, Mr. McCabe? A. The 21st of February, I mean, that I got word that the policy was back and ready for me to deliver it. I called—

Q. 21st of February, 1899? A. 21st of February, 1899.

Q. You got that word through Mr. Finney? A. Through Mr. Finney, and got the policy at his office.

Q. To make that clear, I understand you to say that on the 21st of February, 1899, you got word from Mr. Finney that the policy had been written by the company pursuant to Cable's application, and was at Mr. Finney's office ready for delivery? A. Yes sir.

Q. When was it that you first heard, if you heard at all, that the policy which Mr. Lord had applied for about the time Cable applied for his, had been written and was ready for delivery? A. Simultaneously with the—at the same moment with the Cable.

Q. On the 21st of February, 1899? A. Yes.

Q. Now, Mr. McCabe, what did you do in connection with these policies, if anything, on that day? A. I put the two policies in my pocket and started out to deliver them. I went to Mr. Cable's office first and sent in my card to Mr. Cable; the boy came back and wanted to know the nature of my business and in answer I sent the policy in to him and asked him to examine it, intending by that action to leave it with him, for payment of premium at some future date perhaps.

Q. Well, just state what was said between you, and done? A. Mr. Cable came out in about a minute or two minutes.

Q. Came out of his private office? A. Out of his private office to the outer office with my card and the policy in his hand, and said, "I don't know what to do about this. I don't know much about the company. Has Lord taken his policy? Has Owen taken his?" "Why," I said, "I have got Lord's policy in my pocket. The two policies just came, and your office is the first one that I have come to. I have come to you first. Mr. Lord will take his when I get to his office. Mr. Owen has been postponed, possibly rejected." He handed me the policy and my card, saying he didn't have time to look into the matter at the moment, was very busy. "I will be guided a good deal by what Lord says and does in this matter."

Q. Then you took back the policy, did you? A. I took it very reluctantly and put it—that was not the end. I said some little word to him about, "No time like the present;" I didn't like to let the opportunity go of delivering the policy when it was ready, so that I didn't let it go without some little argument which I forget at the moment, but it was a stock argument that an insurance agent would use.

Q. Then you took the policy back? A. Took the policy back and went on to Lord's office.

Q. Went directly from there to Mr. Lord's office? A. To Mr. Lord's office.

Q. Where was Mr. Cable's office at that time? A. On Wabash avenue, near Jackson boulevard, the second floor.

Q. Then what did you do at Lord's office? A. I found Mr. Lord engaged in conversation with a gentleman, very busy; I left the policy with him with the statement of the company, and told him he might send me a check for it.

Q. You mean a financial statement of the company? A. Yes, sir.

Q. Then after that what—that all occurred on the 21st day of February, 1899? A. The 21st of February, 1899.

Q. After you left Lord's office, what did you do with the Cable policy which you still had in your possession? A. I brought it back to Mr. Finney's office, and handed it to him and told him that—

Mr. Oppenheim: I think we will object to what he said to Mr. Finney, not in the presence of Mr. Cable.

Q. On the same day you took the Cable policy back and delivered it to Mr. Finney? A. To Mr. Finney.

Q. When was the next time that you had anything to do in connection with the Cable policy? A. It was on the 27th of February.

Q. 1899? A. 1899.

Q. Well, what did you do with respect to the policy on that date? A. I brought it to Mr. Lord.

Q. You again obtained it from Mr. Finney? A. I brought it to Mr. Lord, and if you will allow me to explain why I brought it to him—

Q. It is my fault in getting a little ahead of the story. After the 21st of February, 1899, when you returned the Cable policy to Mr. Finney, when did you next see Mr. Lord? A. On the 27th of February.

Q. Where? A. At his office.

Q. 27th of February, 1899? A. 1899.

Q. What was the occasion of your seeing him on that date? A. To collect his premium.

Q. That is the first premium due upon his policy? A. On his own policy.

Q. Well, did you go to his office? A. I did.

Q. Now, please state what was said between you and Mr. Lord at that time? A. I walked in to Mr. Lord and said that I had been out of town ever since I had delivered the policy to him; that the check which he was going to send had not arrived; that I had told Mr. Finney that Mr. Lord would send a check and address it to me; that any letter addressed to me from Mr. Lord he might open and take the check out and pay the premium, and do whatever—make the returns on the policy; and that the company was quite anxious through Mr. Finney to get a report on the policy, and that was the reason of my urgency. In certain previous relations with Mr. Lord I had allowed matters to go for a month or two months without any question. I knew there was no question about the payment of th premium or the return of the policy. Mr. Lord said, "You were t give me a statement of the company." "Why," I said, "I left it with the policy. I can get another one in five minutes over at the office." "Well," he said, "all right. Have you got the Cable policy, too?" I said, "Yes, it is at the office." "Well, bring that along, too, and I will pay you for both of them."

Q. That is what Lord said? A. That is what Lord said, "with the statement of the company."

Q. Then what did you do? A. I went to Mr. Finney's office and got the Cable policy and the statement of the company; returned to Mr. Lord's office and went over the policy with him, as I always do when I deliver a policy permanently—explained the provisions of it. He questioned me as to whether the $50,000 was payable in installments absolutely, or whether the assured might have the privilege of accepting or demanding the commuted value of his option.

I looked carefully through the policy and could not discover that right in the insured on the face of the policy. I said, however, "I will fix that by dictating a letter to your stenographer now, stating that you wish to have that right incorporated in the policy." He called the stenographer, and I dictated such a letter. He said "We both want it," meaning himself and Cable. And the stenographer was told by me to make two copies of it. I said to Mr. Lord, "Have Mr. Cable sign one, and you sign the other, and send them both to the company, and that will no doubt be granted and that right be given to you under that contract." Then I handed Mr. Lord Cable's policy, saying, "Cable is all right, isn't he"? Lord said, "The same as he has been for forty-eight hours." We went on talking about other things about the policy.

Q. Then what was done by— A. He paid me the money for the two policies, and I brought the money to Mr. Finney.

Q. How did he pay you the money—in what form? A. Currency.

Q. That all occurred on the 27th day of February, 1899? A. The 27th day of February.

Q. And you left with him at the time he made the payment both his policy and the Cable policy? A. And the Cable policy.

Q. That payment was for the first premium due upon each of the policies, was it? A. Yes sir.

Q. Please state, Mr. McCable, in what manner Mr. Lord made the remark to you to the effect that Cable was just the same as he was forty-eight hours ago? That is to say, in what way was it said, and calculated to convey what meaning to your mind?

Mr. Oppenheim: I object. That is a deduction, I think.

The Master: I think he may state how he said it, but I don't think the question can go any further than that.

Mr. Porter: It was an ambiguous remark, Mr. Master, and a good deal depended on the manner in which he said it.

The Master: I understand that, and I think it is proper to ask him in what manner he said it.

Mr. Oppenheim: But the question goes much farther than that.

The Master: I say I think the balance of the question is objectionable.

A. I will have to illustrate it by sitting at the table and showing the way he said it.

Q. Try and state it in words, Mr. McCabe, as near as you can, so that the stenographer can get it; that is, describe. A. Well, Mr. Lord sat facing his desk at right angles, not looking at me, and

I sat at his side. Mr. Lord speaks in a very low voice with a little curl to his lip, and without looking at me at all made the reply, so that I paid no further attention to it—in a casual manner.

Q. What did you understand by that reply?

(To which question the defendant objected; the Master sustained the objection; to which ruling the plaintiff, by counsel, then and there duly excepted.)

Q. What meaning did that reply of Mr. Lord's convey to your mind at that time?

Mr. Oppenheim: I object.

The Master: I hardly think that is competent. I think when you have stated what he said, and in what manner he said it, that that is as far as you can go.

Mr. Porter: I think it is difficult to describe always the manner in which a man makes a remark, but an ambiguous remark, which on its face does not mean anything, may mean a good deal when delivered in a certain way, may carry a distinct and definite impression, and I think in view of the ambiguous character of that remark that Mr. McCabe ought to be permitted to testify from the manner in which it was delivered, the meaning which was conveyed to his mind by it, and what apparently it was calculated to convey. There is no other way of getting at the meaning of the remark. We cannot ask Mr. McCabe what he meant by it, we cannot ask Mr. Lord what he meant by it, and the court will be in the dark.

I will ask the witness a preliminary question before the Master passes upon that.

Q. State whether that remark made by Mr. Lord to you on February 27th, 1899, to the effect that Cable was just the same as he was forty-eight hours ago, was delivered in such a way and in such a manner as that it carried a distinct and definite meaning to your mind?

Mr. Miller: That is objected to for the same reason, that it calls for an opinion—an inference.

The Master: Well, I think he may answer that question yes or no.

(To which ruling of the Master the defendant, by counsel, then and there duly excepted.)

Q. (Question read.) A. It was.

Q. Now I will ask you again what was the meaning which the remark carried to your mind, and what did you understand by it?

(To which question the defendant objected.)

The Master: I am in doubt on the question, and in such a

case I think it is advisable to let the witness answer subject to the objection.

(To which ruling of the master the defendant, by counsel, then and there duly excepted.)

A. That Cable was all right.

Q. All right how, Mr. McCabe? A. So as to be entitled to the policy by its terms.

Q. All right in physical health?

Mr. Oppenheim: I object to that as leading.

Mr. Porter: I simply want to get at the witness' meaning as to all right.

The Master: You may answer, Mr. McCabe.

Q. All right, how? A. As to his health and physical condition.

Q. Now, Mr. McCabe, you stated that after leaving Lord that day, you delivered to Mr. Finney the currency which he paid to you for the first premiums upon both of the policies—the Lord policy and the Cable policy; after that when did you next have anything to do in connection with this policy, if at all? A. I had nothing more directly to do with the policy. I left the city at once and went to Cleveland, as I said, between the first and second visits to Mr. Lord, and I was engaged in business there, trying to get through a deal in Cleveland, and on March 2nd I got a dispatch from Mr. Finney stating that—

Mr. Oppenheim: I suppose that is really incompetent.

Q. Well, it just called you to Chicago? A. Called me to Chicago? No, he didn't call me to Chicago. I can't say that.

Q. Well, on March 2nd, 1899, you got some information from Mr. Finney which brought you to Chicago? A. Well, I won't say that; better let me state what the dispatch said.

Mr. Oppenheim: Very well.

A. The dispatch said, "Cable is dead. Company wants policy back." That is all it said, as well as I can remember.

Q. Then what did you do? A. I called Mr. Lord up on the long distance telephone and asked him to make an appointment after six o'clock so we could talk at half rates, and I changed my mind between that and six o'clock, and thought that I had some business in Chicago that I could transact beside that. My family was there; and I came up that night and called Mr. Lord up on the telephone the next morning and asked him to make an appointment where I could meet him and explained that the company wanted this policy back and asked him to meet me at his attorney's. The reason I did that was I didn't want to have any appearance of talking to Mr. Lord in the

presence of anybody else. I wanted Mr. Lord to talk only in front of his attorney, if there was going to be any contest. I could see the full significance, there was going to be a contest, right away, and I wanted him to talk before people who would let him say what was right for him to say.

Q. You made an appointment with him? A. Made an appointment with him on the 3rd of March.

Q. To meet him at what place? A. To meet him at the Bankers National Bank at 11:50.

Q. On what day? A. That was on Friday.

Q. You made the appointment on the 3rd to meet him at the Bankers National Bank on the next day—the 4th? A. On the 2nd and 3rd.

Q. Instead of the 3rd and 4th? A. Instead of the 3rd and 4th, yes.

Q. You made an appointment with him an the 2nd to meet him at the Bankers' National Bank on the 3rd? A. No, it was on the same date. I got the word in Cleveland on the 2nd, and then came to Chicago that night; got here the next morning, the 3rd, and called Mr. Lord on the telephone, perhaps at ten in the morning, and he said to meet him at 11:50 at the Bankers National Bank.

Q. Did you meet him there? A. I met him there. He asked me to come back in half an hour as he had a Directors' Meeting.

Q. Did you say anything to him at that time as to the purpose of your visit? A. Yes.

Q. And if so, what? A. I said that the company wanted the policy back, and there would be no fooling about it. Now, I was repeating the words as they came to me through Mr. Finney and to him from Mr. Strong.

Q. He told you then to come back in half an hour and— A. And he would introduce me to his attorney.

Q. Did you do so? A. I came back in half an hour, and he gave me a card to Mr. Miller.

Q. Mr. H. H. C. Miller? A. Mr. H. H. C. Miller. I went to Mr. Miller's office and told him the object of my call, that I had expected Mr. Lord to be present but I would tell him the whole transaction as I related it here now, so that he might advise Mr. Lord.

Q. And you related the circumstances to Mr. Miller at that time? A. Substantially as now, as near as I can remember.

Q. What was your purpose, Mr. McCabe, in going to Mr. Lord and to Mr. Miller, his attorney, and relating the facts as surrounding the delivery of the policy? A. I thought that on the facts as stated to me—

Mr. Oppenheim: I think I will object to that. His actions speak for themselves, I suppose.

(The objection was sustained.)

Q. Why did you tell Mr. Lord on the 3rd day of March when you met him by appointment at the Bankers' National Bank that you would like to meet his attorney and relate to his attorney the whole transaction?

(To which question the defendant objected; which objection was sustained; to which ruling of the master the plaintiff, by counsel, then and there duly excepted.)

Q. Did you make any statement to Mr. Lord at that time as to why you wished to relate the circumstances surrounding the delivery of the policy, to his attorney?

Mr. Oppenheim: I object. This witness cannot make a self-serving declaration at a time after the contract was entered into.

(Which objection was overruled; to which ruling of the Master the defendant, by counsel, then and there duly excepted.)

A. Yes, I said to him I wanted him to understand and have explained to him by his attorney all the rights he had and all the duties he had.

Q. After that occasion when you went to Mr. Miller's office on the 3rd of March, 1899, and related to him the circumstances surrounding the delivery of the policy, did you have any further conversation with Mr. Lord and Mr. Miller about the matter, and if so, when and where? A. No, sir; until yesterday, which was at Mr. Miller's office, I am positive there was no other conversation during the whole year, until yesterday at Mr. Miller's office.

Q. How did you come to have any conversation at Mr. Miller's office yesterday about the matter? A. I got word from you tha I was to be called here, and I was passing Mr. Lord's office with my brother, who was a visitor in town, and I asked him to step in a moment and I would tell Mr. Lord that I was a witness in this case. Mr. Lord asked me if I would not go with him to Mr. Miller's office, that I had stated the case to Mr. Miller about a year ago, and to know if I would state it again as I remembered it.

Q. And he said he wanted to know, is that the idea? He wanted to know if you would go and state it now? A. I mean by that that he requested me—

Q. To go there and state it? A. To go there and state it as remembered it.

Q. And you did so? A. I went there and stated to Mr. Miller in substantially the same words that I stated it to you.

Q. And substantially as you have already testified to-day? A. Substantially as I have testified to-day.

Q. Now, Mr. McCabe, you said that you saw Mr. Cable on the 21st of February, 1899, when you first endeavored to deliver to him the Cable policy. Please state what his apparent condition was at that time as to health? A. Perfect.

Q. That is, he appeared to you at that time to be in perfect health? A. Yes, sir.

Q. After you failed to deliver him the policy on that day did you remain in Chicago up to the 27th of February? A. No, sir. I left town at once and went to Cleveland.

Q. And had you seen Mr. Cable between February 21st and February 27th, 1899? A. No, I had neither seen nor heard of him.

Q. Had you seen or heard of him since February 21st, 1899, up to March 2nd, when you got word from Finney that he was dead? A. I had not.

Q. At the time you delivered the Cable policy to Lord on February 27th, 1899, did you have any knowledge or information that Cable was ill? A. I had none.

Q. You supposed he was still in good health?

Mr. Oppenheim: I object. He has detailed his conversation with Mr. Lord, and as to whether that was notice or not is a fact.

(Which objection was sustained; to which ruling of the master the plaintiff, by counsel, then and there duly excepted.)

Q. When was the first time that you had any knowledge or information after February 21st, 1899, that Herman D. Cable was ill?

Mr. Oppenheim: I object on the ground that he has already testified as to his conversation with Mr. Lord.

Mr. Porter: I think myself he has almost covered that.

The Master: I don't see any harm in his answering that question.

Mr. Oppenheim: It is drawing a conclusion from this conversation had by him with Mr. Lord was no notice to him.

Mr. Porter: That is not the purpose of the question.

Mr. Oppenheim: Well, that is the effect, whether it is the purpose or not.

Mr. Porter: He has already testified it didn't mean that to him.

Mr. Oppenheim: Then there is no necessity of asking him.

The Master: I think he may answer it.

(To which ruling the defendant, by counsel, then and there duly excepted.)

(Question read.) A. I never had any information of any kind that he was ill.

Q. That is, you knew nothing about any illness until you heard of his death.

Mr. Oppenheim: That is objected to as leading and multiplying the witness' testimony.

The Master: You might ask him what was the first information he had in regard to Herman D. Cable after February 27th, 1899.

Q. I will ask you, Mr. McCabe, when was the first time after February 21st, 1899, that you had obtained any information as to Herman D. Cable—as to his condition, his physical condition? A. The dispatch from Mr. Finney, which I received in Cleveland, saying that Cable was dead.

Q. That was on March 2nd, 1899? A. That was on March 2nd.

Q. Now have you related, Mr. McCabe, the entire conversation which occurred between you and Mr. Lord on February 27th, 1899, at the time the Cable policy was delivered to Lord? A. I have.

Q. Mr. McCabe, I hand you what purports to be the policy of insurance issued to Mr. Herman D. Cable. Please state whether or not that is the original policy which was written upon the life of Herman D. Cable, and was delivered by you to Mr. Lord? A. Yes sir.

It was stipulated by counsel for both parties that the copy of the Herman D. Cable policy attached to and made an exhibit to the original bill of complaint filed in this cause is a correct copy of this policy which has been identified by the witness, with the exception that the original is signed C. F. Fraleigh, as 2nd Vice-President, instead of George H. Burford, President, and that the copy should be considered in evidence with the same force and effect as if the original were introduced in evidence before the Master.

Cross-Examination by Mr. Miller.

Q. Mr. McCabe, you have mentioned the fact of going to Mr. Lord's office with the policies, first his policy, and then afterwards taking Mr. Cable's policy, and you said you went over the provisions of the policy with Mr. Lord. Do you mean to say you went over all the provisions of the policy with Mr. Lord, or what provisions did you go over with Mr. Lord? A. As near as I can remember, I went over all of them, for the reason that I was looking for a provision which

did not appear quickly, and I examined the whole policy, looking for that provision which gave the option to the insured of either taking the commuted value or the installments.

Q. Was that the time you delivered the Cable policy? A. Yes, sir.

Q. Did you read the provisions of the policy to him, all of them? A. We read them together; yes, sir.

Q. You spoke also of calling Mr. Lord up from Cleveland on March 2nd; did you connect with Mr. Lord that night? A. No, I did not.

Q. You did not talk with him by phone then on the 2nd at all? A. No, sir.

Q. The first conversation on the phone with him was on the next day? A. The 3rd.

Q. In Chicago? A. In Chicago.

Q. You have mentioned the fact, Mr. McCabe, at the suggestion of Mr. Lord you came to my office on the 3rd of March, 1899, about twelve o'clock? A. Half past twelve.

Q. A little after. My office is in the same building with the Bankers' National Bank, the Marquette Building? A. Yes.

Q. You had never seen me before? A. No.

Q. And you said Mr. Lord had requested you to come and see me? A. Yes.

Q. And then you made a statement to me? A. Yes, sir.

Q. Now, Mr. McCabe, I want to ask you whether you did not make this statement to me at that time: "I therefore went to Mr. Lord's office last Monday, and asked him about his own and the Cable policy; he was then very busy, and said, 'Have you the Cable policy?' I replied, 'No, but I will go and get it.' I then went directly to the office, got the policy, and went back to Mr. Lord's office. I said to Mr. Lord, 'Is Mr. Cable all right?' meaning is he in good health. Mr. Lord replied, 'He has not been very well for two or three days and is at home; I think he is as well as he has been during the past forty-eight hours.' I thereupon told Mr. Lord that I would like to deliver the policy to him for Mr. Cable and have the premium paid, as we wanted to make our report on all policies before the close of the month. Thereupon Mr. Lord took the policies and paid me the premium on each." A. No, sir.

Q. You say you didn't make that statement? A. No, sir.

Q. Didn't you admit in my office yesterday in the presence of Mr. Oppenheim and Mr. Lord and myself that you did make that statement? A. Well, the point I see there, the difference now, that wasn't what I stated to you. I see the points in there that they are

different now. No, it is nearly like it, but that isn't just the way I stated it. For instance, I didn't say, as you say in the beginning, that I wanted to make a settlement with Lord of his own and the Cable policy. I spoke not a word about Cable until Lord spoke to me about it.

Q. Did you say this: "Is Mr. Cable all right?" meaning is he in the usual health. Mr. Lord replied, "He has not been very well for two or three days and is at home. I think he is as well as he has been during the past forty-eight hours?" A. No, sir.

Q. You say you were in my office yesterday? A. Yes, sir. Well, now, not in that form.

Q. Wait a minute. You were in my office yesterday, you say? A. Yes, sir.

Q. Did you not in my office yesterday make the statement first substantially this: That as far as you could recollect that Mr. Lord didn't tell you that Mr. Cable had been ill for two or three days, but that he did say in reply to a question of yours, "Is he all right?" that "He is as well as he has been for forty-eight hours." Didn't I then go and get this paper, or a paper, and read to you from that paper what purported to be your conversation with me on March 3rd, 1899, and didn't you then say, "Well, that shows how easily one may forget," and didn't you then refer to a paper in your pocket, take a paper out from your pocket, look it over and say, "I find I was mistaken. That is about what I said." Now, is not that true? A. No, sir: not in that—not exactly as you have stated it.

Q. Well, what did you say? A. I said that—to Mr. Lord, "Cable is all right, isn't he?" Lord said, "As well as he has been for forty-eight hours." And then I—this was after I looked at the paper, the paper which I held in my hand, which I looked at in your office yesterday—I made a statement to Mr.—to the agent of the United States Life just a year ago and I made a copy of it at the time, or this is the original and I gave him a copy of it, and while everything was perfectly fresh in my mind.

Mr. Oppenheim: Are you relating now what was said yesterday or are you relating something else? Is this what was said to us in the office yesterday?

Mr. Miller: My question is what you said to me in my office yesterday.

Mr. Oppenheim: I think the witness is misconstruing the question.

The Witness: Yesterday I took this paper out of my pocket and read the whole paper, as I recollect, yesterday, the whole thing, saying this was a statement I gave the United States, and

gave you these words exactly as I give them to-day now; if you said anything else or—now that I see the—answering what you are saying it is different from what I said to Mr. Lord.

Q. Didn't you admit yesterday in the presence of the persons I have named that that conversation which I have read to you as having occurred between you and Mr. Lord on March 3rd, 1899, occurred? A. No, sir; I did not, as you read it there.

Q. You didn't get any request from me to come to my office, did you? A. No sir.

Q. Didn't you say further that you had never seen the paper which you referred to in my office, that you never had referred to that paper since it was written something like a year ago? A. Yes, sir; I had never—

Q. And didn't you then say that you were surprised to see that you were mistaken when you first made the statement to me before you looked at that paper, regarding the conversation concerning Mr. Cable's health? A. Now, put it this way—

Q. Well, answer that question. A. I can't answer it just in the way you put it.

Mr. Miller: Read the question, please.

(Question read.)

A. I used the word "surprised," and it was in the general trend of this conversation which we had there yesterday, but the word surprise was not applied to the words which I have used here but to the circumstance that anything was said at that time; now, I don't know whether I make myself plain or not to you, Mr. Miller. The point is this, that I didn't want to lead you to believe in saying that I was surprised, yesterday, that the words you used in your statement were the exact words that I had used to you a year ago.

Q. Didn't you say further after I read this paper to you, substantially this: "That shows how easily one can be mistaken about a conversation that occurred a year ago, or a long time ago"? A. Some expression of that kind came from me, not in the exact words.

Q. Substantially that? A. Well, the word was used—I don't know just the exact expression. I remember now that the word mistake was used in the conversation.

Mr. Miller: If the Master please, we will discontinue the examination now, and I will want to ask some further questions at the next hearing.

Re-direct Examination by Mr. Porter.

Q. You have been referring to some papers in answer to questions by Mr. Miller. That paper you hold in your hand, what is

it? A. It is a memorandum I made about a year ago. I made it as of the date March 6th, 1899, a little over a year ago. Mr. Strong asked me to give him a statement of the case just as it happened. He said, now—

Mr. Oppenheim: I object.

The Master: Objection sustained.

Q. What I want to get at is, is that a memorandum you made on March 6, 1899, stating the circumstances surrounding the delivery of the Cable policy? A. It is.

Q. That memorandum was made by you at that time and delivered to Mr. Strong, the agent of the company, was it? A. A copy was delivered to him.

Q. Now, at the time you made that memorandum the whole matter was fresh in your mind, was it? A. Yes, sir.

Q. And the relation of the facts which you have given us here in your testimony is in accordance with the memorandum which was made at that time?

Mr. Oppenheim: I object.

The Master: The objection is sustained. You may ask if he has refreshed his memory from the paper.

Q. State whether or not in testifying here to-day as to the circumstances in connection with the delivery of the Cable policy, you refreshed you recollection from that memorandum which you hold in your hand, and which was made, as you say, on March 6th, 1899? A. Yes.

Q. The other paper which Mr. Miller referred to I take it is a paper which he prepared, purporting to contain a history of your conversation with him on March 3, 1899, in his office? A. Yes, sir.

Q. I understand you, in answer to Mr. Miller's question that when you expressed some surprise in his office yesterday, it was not that you had had the conversation—

Mr. Oppenheim: I object. Let him ask the witness what he meant by it.

Mr. Porter: I am just trying to clear the thing up a little. It seems confused.

Mr. Oppenheim: Let the witness clear it up and not the counsel.

The Master: The question should not be put in that leading form, Mr. Porter.

The Witness: If Mr. Porter will permit me now to state what—the way that I—I will say that I was—that I did express some surprise when he read that.

Q. When he read what? A. When he read that paper of his.

And I then said, "Now, I have got a memorandum here that I made a year ago, and haven't opened it since that time, in this office," and I referred to it. Then in front of them and I looked and found there was an expression in there something similar to what Mr. Miller had in his memorandum, and then I said, "How easily we may be mistaken." Now I remember the—I don't think Mr. Miller would say something that he didn't say. Now the thing comes to me very clearly.

(Thereupon the further taking of evidence in the cause was continued until Thursday, March 29th, 1900, at ten o'clock A. M.)

Thursday, March 29, 1900, Ten o'clock, A. M.

Met pursuant to adjournment. Present as before.

JAMES F. McCABE testified further as follows:

Cross-Examination (resumed) by Mr. Miller.

Q. So far as you know, did any one other than yourself have anything to do with soliciting Mr. Cable for the insurance in controversy, and securing the policy which is also in controversy? A. Excepting Mr. Lord; Mr. Lord assisted me.

Q. But no other agent than yourself?

Mr. Porter: I object to the question, because it states a conclusion of agency there, which I do not admit.

Q. Did any other person, acting as a broker or otherwise, so far as you know, have anything at all to do with the placing of this insurance? A. In securing it from Mr. Cable, no.

Q. I mean in personal relations with Mr. Cable? A. In personal relations with Mr. Cable, only myself.

Q. When you received the application from Mr. Cable, what did you do with it? A. I brought it to Mr. Finney.

Q. From whom did you learn that the policy issued on that application had been received from the home office? A. From Mr. Finney.

Q. Where did you first see it? A. In Mr. Finney's office.

Q. When you went from Mr. Lord's office, as you have testified, where did you go? A. To Mr. Finney's office.

Q. When you received the premium from Mr. Lord, where did you pay the premium? A. To Mr. Finney.

Q. Where is Mr. Finney's office? Where was it at that time? A. In the Fisher Building.

Q. What is Mr. Finney's business? What was it at that time? A. Insurance broker.

Q. Was he, as far as you know, an associate of any particular company as agent? A. Not that I know of.

Q. Had you prior to this time solicited insurance for the United States Life Insurance Company? A. About that time I had solicited several merchants and others, within two or three months of that time; might have been before and a short time after the middle of January; I think from about the 1st of December until perhaps the 1st of February.

Q. Who notified Mr. Cable to go to the medical examiner to be examined? A. That I don't know.

Q. Did you? A. I think not.

Q. Who was the medical examiner that examined him, if you know? A. That I don't know. I felt that my work ended when I handed the application to Mr. Finney. That was the reason I had no further interest in the matter.

Q. You spoke in your testimony the other day of receiving a dispatch from Chicago on the 2nd of March, 1899, which caused you to leave Cleveland, where you were, that night, and come to Chicago. Who sent that dispatch? A. Now, I wish to say that the question implies that was the reason that I left entirely. That dispatch was not the sole reason that brought me to Chicago; but the dispatch which I mentioned, and which I received that day, was sent by Mr. Finney.

Q. What other reason had you for coming to Chicago that night? A. My family were here, and my family was not in the best of health at that time.

Q. You came to Chicago, leaving Cleveland the night of the 2nd of March? A. Yes, sir.

Q. And reached Chicago the morning of the 3rd? A. Yes.

Q. Where did you first go after reaching Chicago that morning? A. I went to my office in the Manhattan Building.

Q. Where did you go next? A. If you will give me a moment to see whether I can preserve the continuity of events—it has not occurred to me since that time, and it would be pretty hard for me to trace my movements, if that is what you want, that day. It is over a year ago. Now, if I can think—

Q. Well, did you go to Mr. Finney's office? A. I think I did.

Q. That morning before you saw Mr. Lord? A. Yes sir.

Q. Was he at your office that morning? A. Mr. Finney?

Q. Yes. When you arrived? A. Oh, no; I think not.

Q. Oh, you did go to his office? A. I saw him that morning before I saw Mr. Lord. I telephoned Mr. Lord soon after my arrival and made an appointment with him to meet him at 11:50 at the Bankers' National Bank. In the meantime, or before 11:50 that morning, I saw Mr. Finney; that was before I had seen Mr. Lord.

Q. And you went to the Bankers' National Bank about what time? A. 11:50; that was my appointment.

Q. And there you saw— A. Mr. Lord.

Q. What did you say to Mr. Lord? A. As nearly as possible I repeated the words of Mr. Finney, which I recognized, or imagined, were the words of Mr. Strong; that the company—

Q. I object to what you imagined. What did you say to Mr. Lord? A. I said to Mr. Lord that the company wants that Cable policy back, and there would be no fooling about it; that—

Q. Did you have—finish the answer. A. That I better state the case fully to him, and my connection with it, in the presence of his attorney, so that his attorney could advise him what was best to do in the premises.

Q. Did you have the telegram with you when you saw Mr. Lord? A. Probably I had.

Q. Have you that telegram now? A. I haven't seen it in a year, and I don't know that it is in my possession. It may be in my files. I haven't thought of it since.

Q. You mentioned having telephoned, or having attempted to telephone, from Cleveland to Chicago, to Mr. Lord's office, the night before. Why did you want to telephone to Mr. Lord that night? A. To tell him that the company wanted the policy.

Q. Why did you telephone to him? A. Because he was instrumental in securing it. I had delivered the policy to him.

Q. Why did you suppose he would deliver the policy to the company? A. Why, I supposed that—I had some thoughts that they were very intimately connected as partners, as bank directors together in the same directory; Lord had been instrumental in urging him to get it; I delivered the policy to Lord; Lord had paid me for it, and Cable being dead, Lord was naturally the one that I should go to.

Q. Why should the mere fact that Mr. Cable was dead lead you to ask Mr. Lord to return that policy? A. I did that because Mr.—because of the fact that I learned that the company wanted the policy back.

Q. But would the company have any right to have the policy back if Mr. Cable had been shot or been killed by a cable car? A. I think not.

Q. Did you know what caused his death at that time? A. No, sir.

Q. Then I ask you again, why should you have desired to telephone Mr. Lord in the way you say you did desire to telephone him? Wasn't there something else that induced you to desire that night to communicate with Mr. Lord—especially, something growing out of your previous relations to him? A. None that I know of, except the policy was to be given up.

Q. How did you know it was to be given up; it wasn't given up, was it? A. No, sir.

Q. Then why did you say it was to be given up? A. It seems to me in some manner or another a conversation took place between Mr. Finney, and perhaps Mr. Strong, and myself—while it was not absolutely clear—but I learned at that time that there had been a talk in the—I learned there had been a talk in the Union League Club about getting that policy some way or another, and that they were going to have it, and if that were the fact, that there would be no question about giving the policy back—that was, to my mind.

Q. When did that conversation occur? A. With Mr. Strong and Mr. Finney? That is not clear; I don't recollect talking to Mr. Strong that morning, but Mr. Strong's personality was in the conversation with Mr. Finney, that I had.

Q. Mr. McCabe, I am asking you what induced you on the evening of the 2nd of March to desire to telephone to Mr. Lord in regard to this policy; do you mean to say that this conversation between yourself and Mr. Strong and Mr. Finney occurred at the Union League Club prior to that date? A. No, I don't mean that the conversation occurred between Mr. Strong and Mr. Finney at the Union League Club; it was a repeated conversation that Mr. Lord and Mr. Cable's brother had had at the Union League Club.

Q. When? A. On the 2nd, or 1st, perhaps.

Q. Was that communicated to you at Cleveland? A. No, I think not.

Q. When did you hear that conversation? A. On the morning of the 3rd.

Q. Well, then, how could that fact have had any effect on your mind on the evening of the 2nd? A. I think it could not have had any effect on my mind.

Q. Then you haven't answered my question. A. The dispatch which I received was the reason, of course, that I wanted to talk to him.

Q. Now, then, I ask you again, what was there in the mere statement of the fact that Mr. Cable was dead to lead you to desire to

communicate with Mr. Lord in respect to that policy? A. The dispatch contained more than the words "Mr. Cable is dead." I don't recollect the dispatch, but the dispatch was, "Cable is dead; company wants policy returned," and the rest of it I don't recollect. I don't know that there was anything else, but I would like very much to bring the dispatch here, to look through my files for it. I haven't thought of it since.

Q. That is the only explanation you care to make, then, as to why you desired to talk to Mr. Lord? A. Mr. Lord was a friend of mine, as I thought, and I wanted to place the facts before him.

Q. Why should the fact that he was a friend of yours make you especially desirous that he should make an effort to take up that policy? A. That was not the reason. I desired that he should simply take such action as he should be advised.

Q. Isn't it a fact that you recall that in that conversation had with Mr. Lord about Cable, that he told you he was ill, and that, to use a common expression, you were in a hole; is not that the fact? A. No sir.

Q. You spoke of having come to my office from the bank. You came alone, didn't you? A. I think I did; yes, sir.

Q. With a card? A. With a card from Mr. Lord.

Q. You didn't ask me to wait until Mr. Lord got there, did you? A. I think not.

Q. You introduced the conversation? A. I introduced myself.

Q. You say you never had seen me before? A. Yes, sir.

Q. I never sent for you? A. No, sir.

Q. Have I at any time, or any other of the counsel in this case, or any one in our office, ever sent for you to come to our office? A. No, sir; but Mr. Lord brought me to your office.

Q. You were not sent for by us in any way? A. No, sir.

Q. You also mentioned the fact that on the day that you took the Lord and Cable policies to Mr. Lord's office you read over to him the provisions of the policy. Did you read over to him the application, copy of the application, attached to it? A. I won't be positive about that, and very likely not, for the reason that I was looking—we were looking for a particular point. We were looking for the point, for the provision which gave the assured the right to collect either the commuted value or take the payments in installments. I knewthat that provision naturally would not be contained in the application.

Q. Mr. McCabe, this policy issued by the United States is a very short form policy, isn't it, as compared with most policies? A. There are many much shorter.

Q. It is a short form, and that provision is not hidden in that policy—it is not covered up, is it? A. I don' t remember now.

Q. Isn't it referred to in the face of the policy, and then contained in the provisions on the back of the policy, in very plain language? A. I don't recollect, and haven't looked since. Mr. Lord asked about that provision giving the assured the privilege—that was what led *me*—

Q. Of course the policy speaks for itself. A. If you will let me answer, that is what led me to dictate the letters, which I did, not finding it; both Mr. Lord and myself looked through it, I thought carefully, and we could not find it. Now we might have overlooked it.

Re-direct Examination by Mr. Porter.

Q. Mr. McCabe, you speak of having solicited several applications for insurance for the United States Life Insurance Company, besides the Lord and Cable applications, between December, 1898, and February 1st, 1899; do you remember how many applications you secured? A. I think I could call them.

Q. I don't want the names; I want the number. A. I think six.

Q. Were those applications secured and turned in to Mr. Finney as the Cable and Lord applications were? A. They were.

Q. The six applications you spoke of includes, as I understand it, the Cable and Lord applications? A. Yes, sir.

Q. And the Owen application? A. Yes, sir.

Q. At that time, I understand you, you were an agent of the Equitable Life, or the Washington Life Insurance Company? A. Yes, sir.

Q. And were engaged in some regular business for one or the other of those companies? A. Yes, sir.

Q. Did you also, in connection with that regular business, solicit occasionally insurance from different companies with which you had no attachment or connection? A. Yes, sir.

Q. Acting in that way as an independent broker?

Mr. Oppenheim: I think that is objectionable. I object to that. It is exceedingly leading, and in addition to that the gentleman has given a conclusion or fact. He can state what he did.

The Master: I think it may stand.

(Question read.) A. Yes sir.

Q. State whether or not that was the way you were acting in connection with the solicitation of the Cable and Lord policies.

Mr. Oppenheim: To that we object, your Honor. He stated his actions.

The Master: I think that has all been gone over.

Mr. Porter: I think myself that has been covered, your Honor.

Q. Mr. Miller asked you why the fact of Cable's death, of which you learned on March 2nd in Cleveland, caused you to desire to ring up Mr. Lord over the telephone. Please state whether that desire—whether the death succeeding so quickly after the policy had been delivered, gave grounds of suspicion in your mind that the man had been ill at the time it was delivered, and that had something to do with your desire to call up Mr. Lord?

Mr. Oppenheim: I object to that on the ground that it suggests to the witness the answer desired. It is entirely improper upon re-direct examination to suggest to the witness what it was that caused him to do this or what it was that caused him to do that.

Mr. Porter: After the witness has exhausted his recollection—

Mr. Oppenheim: The witness has answered as to this fully, and no suggestion of such a thing has been made by the answer of the witness, and for him to suggest what it is that influenced him to take a certain action is leading and improper.

Mr. Porter: After the witness' recollection has been exhausted as to a particular fact, his recollection can be turned to a particular fact, and he can be asked if that influenced him. This matter was brought up on cross-examination. He was asked to give his reasons and he gave all he could. Now, I have a right to ask if another reason did not influence him as well.

Mr. Oppenheim: I would not object to him asking if there was any other reason, but I do object to him suggesting what the other reason was.

The Master: The objection is overruled.

Q. (Question read) Now will you answer that? A. No, that of itself would not give me ground for suspicion, for the reason that I have seen it occur and heard of its occurrence a number of times; people dying sometimes after the policy was issued and before delivery; sometimes after delivery, before payment had been made. We are prepared for anything of that kind in the life insurance business.

Q. The fact that the dispatch had informed you that the company wanted the policy back indicated something to your mind, didn't it?

Mr. Miller: I think he has answered that, your Honor.

The Master: I think he has answered that.

Q. Mr. Miller asked you if one reason which influenced you to call up Mr. Lord on March 2nd was not a recollection on your part that Lord had told you at the time that the policy was delivered that Cable was ill. Please state whether Lord ever told you any such thing at that time or any time previously?

Mr. Miller: I object. That has been gone all over in the direct examination, and this certainly, if it is anything, is re-direct examination. The rules are well settled. There must be some end to this sort of thing.

The Master: It is in the line of the questions that you asked in cross-examination.

Mr. Miller: It was proper cross-examination.

The Master: It was proper cross-examination, but I think it is equally proper re-direct examination, in view of the form in which your question was put.

(To which ruling of the master the defendant, by her counsel, then and there duly excepted.)

A. I will say no.

Q. The Lord policy and the Cable policy which you delivered to Lord on the 27th of February, 1899, and which you went over together there as you have stated, were, as I understand, identical in form, and the only difference was in the names and amounts? A. We went over the Lord policy together; didn't go over the Cable policy.

Q. The names and amounts of premium— A. I will say we didn't go over the policies together. We went over one policy together, the Lord policy; that I knew the two policies to be identical and it was not necessary; identical in provisions, in privileges, and it was not necessary to examine both of them.

Q. If you had known that Mr. Cable was ill at home on the 27th of February, 1899, when you delivered the policy to Mr. Lord, would you have delivered it?

Mr. Miller: I object. That is not proper re-direct examination. There must be some end to this sort of thing. He made his direct examination, and we cross-examined. Now, it is a direct examination, going over the same ground again.

Mr. Porter: At the time the examination was concluded, I thought it was understood that if there was anything else that I thought of to ask the witness it might be done. I understood Mr. Miller to assent to that.

Mr. Miller: Any new matter, certainly, but not go over the same ground again.

Mr. Porter: This is a question that I regard as an important one, and he was not asked this before.

Mr. Miller: As to what he would have done in view of what has occurred since is an improper question. It is simply a conclusion that would be improper under any rules of evidence.

The Master: I am not sure as to the admissibility of it. I will allow him to answer subject to the objection.

(To which ruling of the Master the defendant, by her counsel, then and there duly excepted.)

(Question read.) A. I would not.

Mr. Porter: That is all, Mr. Miller.

JOSEPH H. STRONG, a witness produced in behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. Please state your full name? A. Joseph H. Strong.

Q. You reside in Chicago, Illinois? A. Yes, sir.

Q. How long have you lived here? A. I have lived here since January 21st—February 21st, 1885.

Q. What is your occupation? A. Manager of the United States Life Insurance Company, in Illinois and Wisconsin.

Q. That is, the general manager for those two states? A. Yes, sir.

Q. What does that term mean, Mr. Strong? A. I have supervision of the company's business, outlined as procuring applications, or seeing that they are procured, collecting premiums, attending to their detail work, looking after disbursements for them, looking after losses, when we have them, furnishing proofs—

Q. You are the supreme authority in their business in this state? A. In all cases in the agency work.

Q. Where was the home office of this company? A. 261, 262, 263 Broadway, New York.

Q. Do you know Mr. T. J. Finney? A. Yes, sir; very well.

Q. And the business he is in? A. Yes, sir.

Q. Did Mr. Finney have any relations with the United States Life Insurance Company, or connection, in January, 1899, and if so, what? A. No, Mr. Finney hadn't had any connection with the company in 1899, or at any time since the last twelve or fifteen years, I don't think.

Q. His business is that of an independent broker, I understand?

A. That is my understanding. He is a broker in life contingencies, all forms of insurance for all companies that will pay him the compensation that he expects, or requires.

Q. Did you know Mr. Herman D. Cable in his lifetime? A. I did.

Q. How long had you known him? A. I should say three or four years. I remember Mr. Cable back as far as 1897, at the Union League Club; my acquaintance was entirely social with Mr. Cable.

Q. When was the last time you saw Mr. Cable before his death? A. I saw Mr. Cable on Friday, the 24th day of February, 1899.

Q. When did you see him? A. At the Union League Club.

Q. Was he at luncheon there that day? A. He was.

Q. State how he appeared to you at that time with respect to his health and physical condition? A. Well, as he had always appeared to me; he was not one of those robust looking men, but he appeared tobe in his usual good health and appearance. He was not robust. He had a healthy look, but he was not a ruddy figure by any means.

Q. Mr. Strong, when did you first know that Mr. Cable had applied for insurance in your company? A. I think about the 17th of January.

Q. How did that knowledge come to you? A. On the 16th, if I remember correctly—this may not be the date—Mr. Finney phoned me; said that he had a line of insurance that he would place if we could arrange the compensation, involving $150,000. We had some considerable controversy, I think it was all over the telephone, and finally agreed to the terms that Mr. Finney asked for. I don't think that at this interview I knew the parties nor the agent, or where the business was coming from.

Q. In other words, Mr. Finney telephoned you and said he could get certain business? A. He stated that he had a line of business that he would place with us amounting to $150,000, and they were excellent gentlemen—I think the first interview I didn't know who they were.

Q. The next you knew of the matter was when? A. I think the following day we concluded the arrangements, and he gave me the names of the parties.

Q. Who were the parties? A. Herman D. Cable and George S. Lord, and I have forgotten Mr. Owen's name, of Lord & Owen.

Q. Mr. Lord's partner? A. Yes, sir, he was Mr. Lord's partner.

Q. When did you next hear anything about a policy for Cable, or any insurance for Cable? A. These applications—I suppose

you want me to state. The applications were completed in regular form by the medical examiner; that is, applications were prepared at my office and sent to the examiner, Dr. Ware.

Q. Before that, hadn't you been informed that Mr. Cable desired the policy? A. Oh, yes; Mr. Cable $50,000 and Mr. Lord $50,000, and Owen; we filled up the blanks and sent Dr. Ware, the medical examiner, and sent the applications to New York.

Q. Before you sent them to New York you got back a report— A. He examined the applications of the gentlemen named.

Q. You got a formal application signed by Herman D. Cable, and a medical examiner's certificate signed by Dr. Ware? A. Yes sir. These applications were forwarded to New York, and the next advices I had in regard to the Cable-Lord-Owen controversy was a demand for an additional examination, being fifty thousand, and written on low premiums. This second examination was had within a day or two.

Mr. Miller: With whom was this?

The Witness: Our company asked for all three of them, and the additional examinations were made by Dr. Patrick, within I should think three or four or five days. They were forwarded to New York within due course, probably the 15th of February, the policies came back upon the applications of Mr. Cable and Mr. Lord, and the application of Mr. Owen was postponed for one year, owing to a rejection about two months since, that we found out in the meantime.

Q. You got back from the home office of the company, then, a policy written upon the life of Mr. Cable, and one written upon the life of Lord? A. Yes, sir.

Q. You stated that they came back to you from the home office about the 15th of February 1899. Wasn't it later than that? A. Possibly; I am only guessing at that date. We have a receipt for delivery from Mr. Finney on the 20th, I think. We always take a receipt for delivery, for inspection, etc. I think our receipt shows we turned them over to him on the 20th.

Q. Soon after you got them you turned them over to Mr. Finney for delivery? A. Yes, sir.

Q. That was on the 20th? A. I think it was, the 20th of February.

Q. Now, Mr. Strong, when next did you hear anything about those policies? A. On Monday morning, on the 27th of February, I called at Mr. Finney's office. I think we had been advised, our clerk had, possibly, that Mr. Lord's policy had been delivered and paid for in time for our 28th of February report, being the last day of the month.

Q. Then after that— A. I was also advised to the effect that the Cable policy was not delivered and would have to go back probably.

Mr. Oppenheim: Your Honor, I move to strike out as to what he was advised by his clerks.

The Master: That may be stricken out.

Q. Did you learn on the 27th of February that the Cable policy had finally been delivered? A. Yes.

Q. And premium paid? A. Yes, sir.

Q. When did you next hear anything about Mr. Cable? A. Thursday, about, I should say, about two o'clock, I was passing through the Union League Club to the cashier's desk, and I noticed a bulletin of Herman D. Cable.

Q. Stating he was deceased? A. It was a deceased card on the bulletin. I went back to the secretary's office to ascertain whether it was H. D. Cable that I knew.

Q. Was that on Thursday, March 2nd, 1899? A. Yes; about half past one, or possibly two o'clock.

Q. Then I believe you instituted some proceedings to get the policy back? A. Immediately—

Mr. Oppenheim: We object to that. It is immaterial what the witness did after that time.

Mr. Porter: I withdraw the question.

The Master: Strike it out.

Q. State whether or not you made any effort on learning of Mr. Cable's death to get the policy returned to the company by Mr. Lord?

Mr. Oppenheim: We object.

Mr. Porter: I don't ask what the effort was, but merely the fact whether or not you made an effort, or caused one to be made.

Mr. Oppenheim: We object to that as utterly immaterial.

The Master: I think he may answer that.

A. Yes, I did make decided efforts.

Q. Please state whether or not you had any knowledge, or had been informed of any illness of Mr. Herman D. Cable at or before February 27th, 1899? A. None whatever.

Q. You had not heard that he was ill? A. I had not.

Q. Would you, acting for your company, have authorized or permitted the delivery of the policy if you had known that he was ill on that day?

Mr. Oppenheim: That we object to.

The Master: Answer subject to the objection.

A. No, I would not. I could not have delivered it if he was ill.

Mr. Oppenheim: I move to strike out that portion of the answer where he says he could not have delivered the policy. It is not responsive, nor is it proper, I think. When he answers no, that is the end.

The Master: I think it may stand.

Q. When was the first time that you heard anything about Mr. Cable's physical condition after the medical examination had been had upon his application? A. I heard nothing until after his death. Is it proper for me to state what I did? That is the shortest way to tell.

Q. The mere fact is sufficient. A. I immediately called our medical examiner, Dr. Ware, to my office, and asked—

Mr. Oppenheim: I think we will object to any conversation between the witness and Dr. Ware. He stated the fact.

The Master: The objection is sustained.

The Witness: I learned it Friday morning, about eigh o'clock, that would be March 3rd, the details—

Q. I think you stated that you first learned it through the bulletin. A. I did. But you asked the particulars of his sickness.

Q. The mere fact. A. I learned the facts after his death; I think I made that answer. I knew nothing of the facts at the time I saw the bulletin. The secretary of the club stated to me, I remember now, because I wanted to know if he was there—

Mr. Oppenheim: I think that ought to be stricken out.

The Master: That may be stricken out; it is not competent.

Q. The information that you got from the bulletin of the club on Thursday, the 2nd day of March, to the effect that Cable was dead, was the first knowledge that you had in connection with Cable as to his physical condition? A. Yes, sir.

Q. Since the application was made? A. Yes, sir.

Q. Did the United States Life Insurance Company, the complainant here, have any knowledge or information as to Cable's illness—

Mr. Oppenheim: We object.

Q. (Continued) at or before the time when the Cable policy was delivered to Lord?

Mr. Miller: That is clearly objectionable. That is one of the questions here in controversy, and a very material one, as to how the company might have had notice, and to give a conclusion is to conclude the whole question.

The Master: He may answer as far as he knows.

A. We didn't have any knowledge.

Mr. Miller: We object to that very strongly.

The Master: If it is a conclusion of law, it does not conclude the court at all.

Q. Please state, Mr. Strong, the course of your business here for the company, in respect to the policies written in Illinois, Indiana and— A. Illinois and Wisconsin.

Q. Illinois and Wisconsin. What I am trying to get at is whether if you didn't have any information of Mr. Cable's illness, that would be sent anywhere else; for instanse, to the home office of the company? A. All communications are supposed to be addressed to me as manager in this department, but a communication might be sent to the home office, and sometimes communications are sent direct to the home office, but very rarely.

Q. Will you look at this paper I hand you, Mr. Strong, and state what it is? A. It is a form for proofs of loss.

Q. Isn't it proofs of loss? A. Yes, it is proofs for loss.

Q. Was that filed with you at your office? A. Yes, sir. My recollection is that at the request of the administratrix of this estate we furnished them as a matter of courtesy blank proofs of loss —furnished them at their request.

Q. This is the proof of loss which Alice A. Cable, widow of Herman D. Cable, filed with you at your office? A. Yes, sir.

Mr. Porter: I offer this paper in evidence, and will ask that it be marked Complainant's Exhibit No. 1.

The Master: The copy of policy in question which was introduced in evidence at the previous hearing will be marked Complainant's Exhibit No. 1, and the proofs of loss just referred to and introduced in evidence will be marked Complainant's Exhibit No. 2.

Q. Please state, Mr. Strong, what, if any, connection Mr. McCabe had with you as general manager, or with your company, at or about the time this policy in question was applied for? A. None whatever. I didn't know Mr. McCabe. I never knew him or saw Mr. McCabe until I think the 5th or 6th day of March, 1899. I knew there was such an individual on the morning of the 27th of February. I never had seen Mr. McCabe until I met him, I should say the 5th or 6th of March; the 5th of March.

Q. He had no connection or relations with your company through you?

Mr. Oppenheim: I object to that. That is a question of law. He can state the facts, or what he knows about it, but as to whether or not this man was an agent of the company is a question of law.

Deposition of Joseph H. Strong.

The Master: He may answer that.

(To which ruling of the master the defendant, by her counsel, then and there duly excepted.)

A. He had none with me.

Q. State the facts of Mr. McCabe's connection with this Cable matter, as you know them? A. This Mr. Finney and myself had known each other for fifteen years. When these applications came in we learned it was Mr. McCabe—I think I didn't know who he was when the policies came. We delivered them to Finney, exacting from him, as we do in every case outside of our own office, a receipt for the policy in question, that Mr. Finney gave. I called at Finney's office on the 27th of February in the morning, to get a settlement if possible on the Lord policy, and to ascertain the status of the Cable policy.

Q. I simply wanted to get at McCabe's relations with your company. A. Finney stated to me—

Mr. Miller: I object to any—

A. (Continued) I want to make my statement as to what I know about McCabe.

Q. I simply wanted to know whether you had employed McCabe. A. Mr. McCabe and I had never had any business arrangements whatever. I had never employed him, nor has he ever been in the employ of our office or company.

Cross-Examination by Mr. Oppenheim.

Q. When you say that the company had no knowledge of Mr. Cable's condition, you mean that you didn't have any knowledge? A. I mean we neither of us had any.

Q. When you say we neither of us, you don't mean to say what other agents of the company may have known, but simply what you yourself knew? A. There were no agents that could know except myself in this particular case.

Q. Are you positive as to what McCabe knew, or what Finney knew? A. What I knew and the company knew.

Q. When you speak of the company then, you mean that you didn't know, and in your opinion no other person here could represent the company, and therefore the company didn't know? A. I am the only man who represents the company, and I am the company.

Q. You mean that you didn't know it and therefore the company didn't know it? A. No agent of the company or no part of the company had any knowledge of the death of Mr. Cable, or his illness either.

Q. Do you mean to testify to your own knowledge that Mr. McCabe knew nothing about it? A. I could only testify as to what Mr. McCabe said to me.

Q. I am not asking you what Mr. McCabe said to you. When you say that the company had no knowledge of this, you mean simply that you didn't have any knowledge of it. That is all you are testifying to, isn't it? A. Either myself or the company. That is my testimony. I want to make that my testimony.

Q. When you say the company, what— A. I mean the officers of the United States Life Insurance Company and its authorized managers or agents.

Q. Whom do you consider its authorized— A. The authorized manager of Illinois is myself.

Q. Is there any one else in Illinois than yourself— A. As manager, no.

Q. You mean by that, that notice to anybody else than yourself would not be notice to the company? A. Would be no notice.

Q. Have you solicitors for your company here? A. Oh, yes.

Q. Have you other solicitors, other men, in Wisconsin and Illinois to take the applications and deliver the policies? A. We have men that we license and give them contracts; yes, sir.

Q. You knew under the Illinois statute that one who takes the application and delivers the policy and collects the premium for the company, is an agent of the company?

Mr. Porter: I object to that.

Mr. Oppenheim: The witness has testified as to what th company knows. I am asking as to his knowledge.

Mr. Porter: He is trying to ask a question of law.

Q. In your answer that no agent of the company had knowledge did you exclude the person who received the application?

Mr. Porter: He did not state that—

Q. (Continued) Did you exclude the person who received the application, who delivered the policy, and collected the premium?

Mr. Porter: Your Honor, I object on the ground that the witness has not stated that he had no knowledge; he simply stated the company had no knowledge, and no authorized manager of the company.

The Master: I think he may answer that question.

(Question read) A. There was no authorized agent that I know of.

The Master: Answer the question yes or no.

The Witness: I want to answer it truthfully and correctly.

The Master: You may explain afterwards if you want to.

Deposition of Joseph H. Strong.

Q. The question is, did you exclude the man who delivered the policy? A. In my statement under oath I did exclude him as being an authorized agent.

Q. At the time you received the application did you know who it was that had received these applications, or obtained them, rather? A. At the time that they were received I think perhaps McCabe's name had been mentioned to me. It does not appear anywhere on the application of the policy; there is no evidence that he was the agent.

Q. Did you know at this time that Mr. McCabe was the person who had secured these applications? A. I didn't know his relations with Mr. Finney. Whether or not Mr. Finney telephoned he didn't control the business—

Q. Did you know on the 17th of January that Mr. McCabe was the person who had procured these applications? A. No, I did not.

Q. When did you first know that? A. The first time I ever knew it—knew his relations in regard to the matter, was Sunday, the 5th day of March, was the first time I ever saw him.

Q. Did Mr. Finney tell you that Mr. McCabe had obtained these applications? A. I think Mr. Finney sent the application in to us as McCabe's business. That is my understanding. I knew there was such a man as McCabe who had favored Lord, and was reimbursed by giving him some business; that is my recollection.

Q. In this conversation on February 27th, when you received this money, didn't you know then that McCabe had received this application? A. No, sir. I knew the money had to be paid through Mr. McCabe.

Q. You didn't know who paid it through McCabe, or how? A. Mr. Finney had told me it was a matter Mr. McCabe would settle with Mr. Lord.

Q. At the time you delivered the policy to Mr. Finney, did you charge the amount against Finney? A. Yes.

Q. On your books? A. Mr. McCabe's name does not appear on our books anywhere.

Q. I mean when you delivered the policy over to Finney? A. I charged the gross amount to Finney, and he gave us the receipt.

Q. And you looked to him for payment? A. And he paid us for it.

Re-direct Examination by Mr. Porter.

Q. Do you mean that you turned over—

Mr. Oppenheim: I object to what he means. It seems to me

that the witnesses sometimes here have been directed what kind of an answer to make. I do not mean voluntarily that Mr. Porter leads the witness, but it is improper for him to suggest to the witness what he means.

Mr. Porter: I concede the gentleman on the other side has a right to make all the objections he pleases, but I have a right to ask what questions I please.

The Master: Put it in a different form. Ask what did he mean.

Mr. Porter: I know of no way of getting at this question, getting at the point, excepting beginning that question that way. I would like permission to ask the question, and if the master excludes it all right.

Q. Do you mean on the 21st of February, when you turned the policies over to Mr. Finney for delivery, that you charged him with the first premiums on your books, or that you charged the premiums after you learned he collected them.

Mr. Oppenheim: I insist that is exactly what I objected to.

The Master: I think there is not any ambiguity about the answer as he gave it before. It seems to me it is perfectly plain.

Mr. Porter: Does the master exclude the question?

The Master: I would like to hear the previous answer read. As I understand it, it does not require any explanation.

(The following questions and answers were read: "At the time you delivered the policy to Mr. Finney did you charge the amount against Finney? A. Yes. Q. On your books? A. Mr. McCabe's name does not appear on our books anywhere.")

The Master: That is plain.

The Witness: We charged every agent or broker or individual who was acting in connection with us on what is called a tickler.

Q. What did you charge him with? A. With a premium, whatever the premium was; $848 in this case, I think. Seven hundred and something in the case of Mr. Lord .

Q. When you turned the policies over to Mr. Finney for delivery on the 21st of February, you charged Finney with the first premium on your books? A. Yes, sir. He gives a receipt showing what the first premium is; if he pays it we credit him with the commission; if he don't, the policy is returned, and of no account.

Deposition of Thomas James Finney.

THOMAS JAMES FINNEY, a witness produced in behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. Please state your full name? A. Thomas James Finney.

Q. What is your business? A. Up to very recently a life insurance broker.

Q. What was your business in December, 1898, and January, 1899? A. Life insurance broker.

Q. What do you mean by— A. A man that places life insurance with any company he sees fit to make a contract or arrangement with.

Q. A life insurance agent not representing exclusively any company? A. Not representing exclusively any company.

Q. Please state, Mr. Finney, how the matter came up with you of obtaining Herman D. Cable's application for insurance? A. I suggested to Mr. McCabe the probability that the insurance could be obtained. He had been a customer of mine previously, and I had prepared them for the business by correspondence.

Q. Speaking of them, you mean Cable, Lord and Owen? A. And some others. And Mr. McCabe on my suggestion saw these gentlemen and took their applications for insurance, $50,000 apiece.

Q. You first arranged with the general agent of the United States Life Insurance Company something about it? A. Yes, sir; made an arrangement with him for a certain amount of insurance within a certain time on a certain basis.

Q. When Mr. McCabe secured the applications from Lord and Cable they were brought into you? A. Yes, sir.

Q. What did you do with them? A. I ought to explain that I have a little slip of my own that has no company on it. I fill it up with whatever company I take the application for. Mr. McCabe brought those slips in to me, and I sent them to Strong. He copies the facts that the slips indicate in his regular form. I had nothing to do with the details after sending him those slips.

Q. After you had turned the application over to Mr. Strong, when did the matter again come up in your office? A. Not 'until the policies were sent over along late in February, with the exception that I inquired two or three times what was the matter that the policies were so long coming.

Q. You finally got the Cable and Lord policies in February? A. Yes, sir.

Q. Do you remember about what date? A. About the 20th of February, as far as I can remember.

Q. Then what did you do with them? A. I dropped a note to Mr. McCabe, and gave them to him and asked him to deliver them.

Q. Did you see Mc Cabe again on that day? A. I can't tell what I did that day. In fact I can't give you a very connected detail of the order of events up to the time of the delivery.

Q. After you gave the Cable and Lord policies to McCabe for delivery, when did you next see the Cable policies? A. Very soon afterwards; he delivered the Lord policy and brought back the Cable policy saying that Mr. Cable—

Mr. Oppenheim: I object to what he said.

A. (Continued) Brought back the Cable policy undelivered.

Q. What did you do with the Cable policy? A. It remained in my desk.

Q. How long? A. Until the 27th of February.

Q. That was on a Monday, wasn't it, or do you remember A. I think it was. I am not quite sure.

Q. 1899? A. Yes sir.

Q. And then on the 27th of February what became of the Cable policy? A. Mr. McCabe came back from Cleveland, on the morning of the 27th of February, and came to see me, and I suggested that he would go down and collect the Lord policy.

Q. You need not say what occurred between you and McCabe, but simply what was done with the Cable policy? A. I gave it back to him with the request that he would deliver it the second time.

Q. You gave him the Cable policy some time on that day, did you? A. I did, that morning.

Q. What was the next you heard of it? A. The next I heard of it was late that afternoon when he came in bringing the money for both policies.

Q. The first premiums on both policies? A. The first premiums on both policies.

Q. And you were informed at that time, I suppose, that they both had been delivered that day? A. Yes, sir.

Q. Now, Mr. Finney, had you known Mr. Herman D. Cable— A. Several years.

Q. (Continued) prior to that time? A. Several years. Had various transactions with him.

Q. You had written policies for him? A. A hundred thousand the year before.

Q. When was the last time you had seen him prior to the 27th of February? A. Along in October and November of the previous year.

Deposition of Thomas James Finney.

Q. How did he appear to you then, as to the condition of his health? A. Excellent health. He was pronounced to be an excellent risk.

Q. Did you have any knowledge or information as to his illness at any time on February 27th or previously? A. Never until Thursday following; we never heard a word, until I heard of his death.

Q. You heard he was dead on Thursday, the 2nd day of March? A. About noon, Thursday; about noon was the first I knew of his illness; I heard he was dead.

Q. Would you have given Mr. McCabe the policy to deliver on the 27th of February, 1899, if you had known that Cable was at that time ill at his house?

Mr. Oppenheim: That is objected to.

The Master: Answer subject to the objection.

A. By no means; no, sir.

Cross-Examination by Mr. Miller.

Q. You say that you had placed for Mr. Cable, prior to this time, something like $100,000 insurance on his life? A. Yes, sir.

Q. Do you know whether any part of that was cancelled? A. No sir. I know that none of it was cancelled.

Q. You know that none of it was cancelled? A. Yes, sir.

Q. Are you sure of that? A. Yes, sir. I should say I am not sure of it. I have never heard that it was. I can't say positively it was not. Nothing of that kind ever came to my notice, and I think I should have known.

Q. Of the $100,000 which you placed for him, the question is whether or not any of that was cancelled or lapsed before— A. That is a very different thing, sir. The policy lapsed in November.

Q. Of 1898? A. Of 1899. It lapsed in 1899.

Q. How much lapsed— A. Yes, 1898; that is right.

Q. (Continued) Prior to this application? A. That is right; it was one single policy; it lapsed—

Q. The same amount as this new policy? A. The new one was $50,000; the old $100,000. I insured him $50,000 more through Mr. McCabe in the same year.

Q. I understand now, in place of cancellation, a part of this $100,000— A. The whole $100,000.

Q. (Continued) had lapsed in October and November, 1898. A. In November, 1898.

Q. Prior to taking up the placing of this insurance of $150,000 with the United States, had you done business with the United States, other business with the United States? A. Oh, yes, sir.

Q. How long a time? A. In a desultory way for the last seven years, I have been dealing with Mr. Strong.

Q. And other companies? A. Yes, sir; with other companies.

Q. In respect to this other insurance, did you employ McCabe to assist you? A. As I had in other cases, with other companies.

Q. Did Mr. Strong know that Mr. McCabe was in your employ in this matter? A. I could not say with absolute positiveness, but I didn't know he knew until along towards the end when he wanted settlement. I don't think he knew—

Q. About the time— A. He knew, because I told him I was waiting for Mr. McCabe to collect the premiums. I think that was the first he knew about Mr. McCabe.

Re-direct Examination by Mr. Porter.

Q. The $50,000 which you wrote for Mr. Cable in the fall of 1898 was in what company? A. That was in the Provident Savings. Mr. McCabe also transacted that business with Mr. Lord and Mr. Cable.

Q. He had also written considerable insurance for Mr. Lord just previously to this $50,000 policy in the United States Life Insurance Company? A. In the fall previous Mr. McCabe wrote upon the lives of each Mr. Cable and Mr. Lord similar policies of $50,000 in the Provident Savings, Life and Insurance Society.

(Whereupon the further hearing of this cause was continued until Wednesday, April 4th, 1900, at ten o'clock, A. M.)

Tuesday, April 3rd, 1900, 3:30 P. M.

Met pursuant to adjournment. Present, as before.

JAMES F. McCABE was recalled for further examination by Mr. Porter, and testified as follows:

Q. Mr. McCabe, at the last session you were asked what were the contents of the telegram which Mr. Finney sent you while you were in Cleveland on the 2nd of March, 1899, and you were not quite sure of the entire contents. You may state whether since that time you have searched for that telegram? A. I have, and I have found it.

Q. Have you the telegram with you? A. I have the telegram.

Q. Will you please produce it.

(The teleggrram was produced by the witness and offered in evidence in behalf of the complainant; to which the defendant

objected as incompetent and immaterial; which objection was overruled, to which ruling of the master the defendant then and there duly excepted.)

The telegram was marked "Complainant's Exhibit 3," and is in the words and figures following, to-wit:

Chicago, Ill., Mar. 2:

James F. McCabe, Hollenden Hotel, Cleveland, Ohio;

Cable died this morning, was sick when policy delivered. Company want policy back. Am non-committal pending hearing from you. Have you any advice.

THOMAS J. FINNEY.

4:24 p. m.

Q. That is the original dispatch you got in Cleveland? A. Yes, sir.

Q. Now, one other question, Mr. McCabe. I wish you would state what time of day it was on February 27th, 1899, when you had the first conversation with Mr. Lord? A. I cannot state the exact hour. I will state it was between two—possibly two and three thirty.

Q. In the afternoon? A. Yes, sir; it was in the afternoon.

Q. That was the conversation, was it, when he told you to go back to your office and get a financial statement and to bring the Cable policy with you?

Mr. Miller: I object. He assumes that that is the testimony of the witness. I don't think it is quite.

The Master: That is the way I recollect it.

Mr. Miller: In that form?

The Master: Substantially so.

Mr. Porter: I am merely trying to identify the conversation now.

(Record read.)

Mr. Miller: I think that is quite different from the question.

Q. Was that the conversation wherein Mr. Lord asked you to bring along the Cable policy when you went to the office for a financial statement? A. Before I answer, if you will permit me to answer—I have not got continuity of the last question.

(Record read.)

A. Yes.

Q. After you went to the office and returned—after you went to your office and returned to Mr. Lord and had the second conversation on that day at which time you delivered to him the Cable policy,

please state about the time of day that that occurred? A. I did not go to my office; I went to Mr. Finney's office and got the policy and the statement, and I cannot state the exact hour of the second conversation with Mr. Lord, but it was possibly between half past three and five. It was later than the first conversation, of course, and I cannot place the hour exactly. My idea is that it was about four o'clock.

No cross-examination.

ALLEN B. CLAYTON, a witness produced in behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. What is your name? A. Allen B. Clayton.

Q. Where do you reside? A. Evanston.

Q. What is your occupation? A. Physician.

Q. How long have you been a physician? A. About thirty years.

Q. Are you practicing in Evanston? A. Yes.

Q. How long have you been practicing there? A. About fifteen years.

Q. Were you acquainted with Herman D. Cable, deceased, in his lifetime? A. I was.

Q. Please state whether or not you were called to attend Mr. Cable in February, 1899, and if so upon what date? A. I was on the 24th of February, 1899..

Q. How did the call reach you, doctor? A. Why, my impression is that it was telephoned to me. He sent his coachman after me, his carriage.

Q. About what time of day was it? A. Well, it was late in the afternoon, probably between five and six. I know I was a little late to dinner.

Q. Did you go to Mr. Cable's house in response to that call? A. I did.

Q. Did you see Mr. Cable? A. I did.

Q. Did you make a professional examination of him? A. I did.

Q. How extensive was the examination, doctor? A. I made a careful examination, examined his chest with a stethescope, took his temperature and pulse, noted the condition of the skin.

Deposition of Allen B. Clayton.

Q. Please state in what condition, physically, you found him there that afternoon? A. Why, I found him a very sick man.

Q. What was your diagnosis of the case at that time? A. I diagnosed his case incipient pneumonia, the first stage of pneumonia.

Q. State what his condition was with respect to his breathing, respiration, at that time? A. His respirations were very rapid, short, at that time.

Q. And was there expectoration? A. Not at that time; no, sir.

Q. Please state whether or not you regarded his condition there as a serious one? A. I did. I regard all cases of pneumonia as serious.

Q. Was this case any particular kind of pneumonia, doctor? A. Well, it seemed to extend pretty well over both lungs—double pneumonia.

Q. In what position did you find Mr. Cable when you got there that night? A. Found him in bed.

Q. Did you find him suffering any pain? A. Suffering considerable pain, yes, in the chest.

Q. As I understand you, the disease had already set in at that time and had made some progress? A. Yes, sir; sufficiently so so that I could recognize it.

Q. Do you recollect, doctor, how his temperature was? A. I couldn't say positively.

Q. Will you give us an idea of what has been the extent of your experience with cases of pneumonia? A. Well, I have treated a great many cases in the course of thirty years practice.

Q. Frequently attended cases similar to this case of Mr. Cable's? A. Oh, yes.

Q. Was this a case of what you doctors term acute pneumonia? A. Oh, yes, very acute.

Q. Now, you may state, doctor, whether in your opinion Mr. Cable's condition at that time on February 24th, 1899, was such as to threaten his life? A. I considered it serious, but not necessarily fatal.

Q. Were his symptoms such as to cause a reasonable apprehension as to organic derangements? A. Oh, there certainly was organic derangement.

Q. At that time? A. Certainly, certainly. I mean by that that the blood vessels were congested; they were under tension, of course.

The Master: Did that condition include the entire lungs?

A. The most, the greater part of both lungs.

Mr. Porter: State, doctor, to what extent cases of pneumonia of that kind are fatal; that is, give us your general experience and observation on that subject. A. From my own experience or from statistics?

Q. Well, from both. A. I could not state as to statistics. At least I don't recall the percentage. I suppose in my own experience, 25 per cent. proved fatal.

Q. And Mr. Cable at that time was in such a condition, wasn't he, as to create an apprehension in your mind of fatal termination?

Mr. Oppenheim: Rather leading, it seems to me, his questions are.

The Master: You might better put it, was he or wasn't he?

A. Well, I would say that I considered it a serious case.

Q. What I am getting at is this, you did not regard it as a slight or temporary ailment? A. No, sir; nor necessarily fatal.

Q. State whether in your opinion he was then in sound health? A. At the time I saw him?

Q. Yes, sir. A. He certainly was not.

Q. After your examination of Mr. Cable on that evening, did you communicate the results to anybody there at the house? A. I don't remember whether I did or not.

Q. Do you remember who was present at the time the examination was made? A. Mrs. Cable was there. I remember Mrs. Cable. I cannot recall anybody else. My mind was on my patient.

Q. You do not remember whether Mr. Lord was there in the house at that time or not—Mr. George S. Lord? A. I don't think he was; I don't remember.

Q. Did you see Mr. Lord, doctor, within a day or two after that and discuss Mr. Cable's condition with him? A. Not to my knowledge; not to my recollection.

Cross-Examination by Mr. Miller.

Q. Did you call again at the house after that? A. I did not.

Continued subject to notice.

Monday, June fifth, 1900, Ten o'clock, A. M.

Met pursuant to notice.

Present as before.

It is hereby stipulated by the counsel for both parties that the general officers of the complainant company residing in New York City, would testify, if present, that they had no personal

knowledge that Herman D. Cable, deceased, was taken ill at any time after the application for the policy in controversy was made, and no personal knowledge until after his death that he was ill at any time between the date of the application and the date of his death, and that it may be taken and considered that such testimony was duly given as part of the evidence of the case.

EDWARD H. WEBSTER, a witness produced on behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. What is your name? A. Edward H. Webster.
Q. Where do you reside? A. Evanston.
Q. How long have you resided in Evanston? A. Over thirty years.
Q. What is your occupation? A. Physician.
Q. How long have you practiced that profession in Evanston? A. I should say since 1880, 79, possibly.
Q. Were you acquainted with Herman D. Cable in his lifetime? A. I was.
Q. Were you the family physician of Mr. Cable? A. Yes, sir.
Q. Please state whether you attended at his last illness? A. I did.
Q. When were you called to see Mr. Cable on the occasion of his last illness? A. I looked that up the other day. My impression is the 25th of February.
Q. To refresh your recollection, doctor— A. That would be Thursday or Friday night.
Q. Let me refresh your recollection by handing you your own affidavit filed in connection with the proofs of loss. (Showing witness document) A. Made the first visit February 25th. Well, I was called the night before that, but I wasn't at home. I was in the city, so I didn't see him. February 25th, that is right; yes, sir.
Q. What year, doctor? A. 1899.
Q. Do you recollect that February 25th, 1899, was on Saturday? A. Well, that was my impression, Friday or Saturday; I could not swear to that, though.
Q. Do you remember what time of day you were called there on February 25th? A. In the morning.
Q. Do you know whether Mr. Cable had the attendance of another

physician before that, temporarily, until you could be got at? A. Yes, sir; Dr. Clayton saw him the night before.

Q. Did you make an examination of Mr. Cable on Saturday, February 25th, when you were first called there? A. Yes, sir.

Q. You may state whether or not there was a trained nurse in attendance upon him at the time you got there? A. I really cannot remember. Let me see if I can possibly remember. My impression is that I got a trained nurse after I came there myself, but I can't tell that. I can't remember whether they got her the night before or whether I put the nurse in there after I got there. That is a matter of routine with me, and after a case is over there is nothing to bring it up. I couldn't say.

Q. Well, don't you remember, doctor— A. My impression would be that I got the nurse after I came there. Whether I got her that day or not I could not tell. He was taken sick the night before rather suddenly, and naturally would hardly have a nurse until I saw him.

Q. You are not positive on that point? A. No, no, I am not positive on it at all. I could not swear to it one way or the other. My evidence on that point would be no earthly account, because I don't know myself.

Q. You don't remember of being informed on Saturday, the day you were first called there, that Mr. George S. Lord had driven in a cab and got a nurse the night before and brought her there? A. I don't remember that; it might be, though. I will say right here that I would not remember it in any case; such a thing might occur and might not; it is such a common occurrence that there is nothing to recall it, you know.

Q. Where did you find Mr. Cable in his house on the day you were first called there? A. I found him in bed.

Q. You said, I believe, you did examine him at that time? A. Oh, yes.

Q. And what did you find he was suffering with? A. Pneumonia.

Q. The disease of pneumonia had already set in at that time? A. Yes, sir.

Q. Do you remember the date of Mr. Cable's death, doctor? A. No. I should say the 2d of March.

Q. 1899? A. Yes, sir.

Q. In other words; there were six days between the day you first got there and the date of his death? A. Yes, sir: I couldn't say whether that was—I couldn't say the day of the week, whether it was Wednesday, Thursday or Friday, but from my—from the charges on my book I should say it was the 2d of March that he died.

Q. I refresh your recollection about that by calling your attention to the affidavit made about the time, which says 2d of March. A. Second of March, undoubtedly, that is correct.

Q. Now you were in attendance on Mr. Cable during those six days, between the 25th of February and the 2d of March? A. Yes, sir.

Q. And he suffered from pneumonia, I believe, all that time, did he not? A. Yes, sir.

Q. And what did he die of? A. Died of pneumonia. Died of a very common occurrence in pneumonia. That is collapse, heart failure; something that occurs in the mildest cases as well as the most serious ones. I will say that Mr. Cable's case was not a serious one of pneumonia; many a person has twice as bad a case as that and gets well. I have seen a man die of a slighter case, too. Kipling had a case about that time of double pneumonia. I fancy he was twice as sick as Mr. Cable was, as far as pneumonia was concerned.

Q. Mr. Cable's case was a case of double pneumonia? A. No, sir, single pneumonia, of the right lung, involving up a little about the middle—never extended.

Q. Pneumonia of that kind is always more or less dangerous? A. Pneumonia of any sort, of course, is dangerous. Yes, a very slight case of pneumonia, too, will sometimes die.

Q. A case of that kind always causes a physician anxiety? A. Yes, sir; still—well, of course, any case of pneumonia causes a physician anxiety, yes, sir; that is right. We expected Mr. Cable would get well, though; at least I did, and so did the family. Indeed, we didn't get alarmed more than we would be in any case of pneumonia up to the day of his death, and the consulting physician at that time gave a favorable prognosis, but he had a collapse that morning.

Q. Now, you called some other physicians in consultation? A. Yes, sir.

Q. Do you remember when they were called, doctor? A. It was the day before his death. That was a collapse the morning before his death, and he was carried through it with some difficulty. Previous to that there was no occasion to call consultation. This was running along aside from the nervousness incident to his case, which was a peculiarity of his own. The case was doing as well as could be expected up to the time of this collapse. Of course that made a different aspect altogether. That sort of thing may occur, though, in a very light case. I have seen cases much lighter than Mr. Cable—after getting up, perhaps, and getting up to use a vessel or something of that sort, will suffer a collapse. Indeed, it is an axiom in pneumonia not to allow a patient to arise.

Q. But the inflammation, the lung disease, continued from the time you got there until the time of his death, all the time. A. Oh, yes, sir. The collapse occurred about the time of his crisis of the pneumonia. We should expect, if he had not died at that time, this thing would have been a crisis, and he would have been better. That is a common time for such an occurrence.

Q. His case was one which is generally known as acute pneumonia, wasn't it? A. Yes, I should think so.

Q. Now— A. Known as pneumonia, as distinguished from the bronchial pneumonia, called croupous or lobar pneumonia.

Q. Who did you call into consultation? A. Dr. Edwards. I don't remember his first name.

Q. Dr. Edwards and Dr. Phillips. Did you have both those physicians? A. Dr. Phillips was over there. That is so; I had forgotten that.

Q. You called the two together? A. I fancy I did. I think I called Dr. Phillips in the first place, and then called Dr. Edwards as an expert from the city, and my impression is that Dr. Phillips was back there at the time we came, too. I would not swear to that.

Q. Didn't you also seek to get Dr. Ingils? A. Yes, sir. Could not get him. He was a friend of the family and was the first choice, but he was out of town.

Q. Now, will you tell us, doctor, whether Mr. George S. Lord of Evanston was present there from time to time during the illness of Mr. Cable, between February 25th and March 2nd? A. I should say so. I remember seeing him there once or twice.

Q. Generally acquainted with him, are you not? A. Oh, yes.

Q. Did you not see him frequently there at the house inquiring as to Mr. Cable's condition? A. I cannot say as to that. I have no remembrance of that. Mr. Cable was a very popular man and a good many people—many of his friends were there. I have a distinct remembrance, however, of seeing Mr. Lord once or twice. I don't think he was there so it made any particular impression on me any more than others.

Q. This paper which I have exhibited to you, and which I now show you again, and which has been introduced in evidence as complainant's exhibit 2, being proofs of loss, contains on the second page an affidavit, does it not, doctor? A. Yes, sir.

Q. That is your signature? A. That is my signature; yes, sir.

Deposition of Edward H. Webster.

Cross-Examination by Mr. Miller.

Q. Doctor, you have been in very active practice in Evanston for he last fifteen years? A. Yes, sir.

Q. On Sunday and Monday, prior to Mr. Cable's death, what was his condition respecting the disease; was he improving or getting worse? A. My remembrance is that he was apparently better Sunday and Monday. Of course the condition of the lung was stationary, but he certainly felt better. I was somewhat encouraged Sunday, I remember, but I can't say distinctly about Monday. I think Monday the distressing unfavorable feature about his case was an extreme nervousness. My remembrance is that that did not develop until later than Monday. I should say Monday night, or Tuesday; it was impossible to get him to sleep.

Q. Is it not a fact, doctor, that the family and friends in Evanston, so far as you know, believed he would get better on Sunday and Monday?

Mr. Porter: Well, I hardly think, Mr. Master, that is competent.

Mr. Miller: As far as he knows.

A. Yes; as far as I know.

Mr. Miller: You can answer the question.

A. Up to the day of his death—

Mr. Porter: Pardon me, if the master will rule.

The Master: I think that is rather a broad question. I don't think it is competent.

Q. What was your own expectation? A. I expected him to get better; yes, sir. I expected him to get well up to the day before he died, and I can't say what I did expect then. I was very much alarmed.

Q. Did you so advise the family that day, that you thought he would get better? A. Yes, sir; I gave them every assurance that a doctor has a right to give in such a case, that he would get better. The day before his death, I am free to confess, I was very doubtful; but the consulting physician at that time gave the opinion that he would still get well the afternoon of the day before his death.

Re-direct Examination by Mr. Porter.

Q. When you say, doctor, that you expected him to get better, do you mean you hoped he would get better? A. I mean the same thing that I would say in regard to yourself under the same circumstances. If your wife asked me would you get well, I should tell her I saw no reason why he would not; that I expected him to; but gave

her no guarantee. I think I am very conservative in those sort of cases. I give them on the bad side, rather than the good, and after explaining to his people the nature of such a case, then, as my personal opinion, I gave it that he would recover.

Q. You didn't mean, then, at that time, at least on Sunday and Monday, and before his death, he was in sound health, and that he was absolutely sure to recover? A. That would be ridiculous, sir. In any case of pneumonia, I don't care if it does not involve but one lobe, there are dangers about the case. I have seen a man die of pneumonia after he was perfectly well, by getting up too soon; and simply getting up for a movement of the bowels; something of that sort; and so has every other doctor.

Q. Is it not true, doctor, that Mr. Cable's condition had been weakened two or three weeks before this attack of pneumonia, by an attack of grippe? A. Really, I can't say in regard to that. I have no remembrance of such things. That might be, though. He certainly had had no medical treatment of any kind previous to that. I might have seen him for a cold, or something of that sort, or sore throat, or so-called grippe—Lord knows what that is, you know—but he had had no medical treatment. I fancy everybody is a little weak along in February and March, you know. I am, myself.

LYMAN WARE, a witness produced in behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. What is your name? A. Lyman Ware.

Q. Where do you reside? A. Chicago.

Q. What is your occupation? A. Physician.

Q. How long have you been a physician in Chicago? A. Thirty years, or over.

Q. What was your relation, if any, with the United States Insurance Company in January, 1899? A. Medical examiner.

Q. Did you know Herman D. Cable in his lifetime? A. No.

Q. Did you examine him? A. I examined him.

Q. In January, 1899, for life insurance? A. Yes; I did.

Q. That is, you, representing the company, made the medical examination of Mr. Cable at the time he applied for a policy? A. I did.

Q. That examination was a personal examination of Mr. Cable, was it? A. It was.

Q. Do you recollect where it was, doctor? A. Made at his private office; Wabash avenue; I don't remember the number.

Q. You may state whether or not Mr. Cable, on the occasion of that examination, signed a formal application for the insurance policy in controversy here? A. He did.

Q. I hand you here a paper, and ask you to state whether or not that is the paper which Mr. Cable signed on the first page of that, the application which Mr. Cable signed at that time? A. It is.

Q. Those are the signatures in two places, are they? A. They are.

Q. Upon what day was that application signed, if you can tell? A. I can only tell by looking at the application itself. The date of it is the—my date on which I examined him will show on this side. This is my writing here (indicating). It would be the 17th of January, 1899.

Q. You examined him on the 17th of January and he signed the application on the 16th of January, 1899; is that correct? A. No, the application was signed the same day that I examined him. The application may have been written the day before, but evidently I examined him, and I might state that there are two what we call applications; that is, there is the application that the agent takes when he solicits the man for insurance; then that is given to me, or a copy of that—you see it here—is made, and then this portion which is called the medical portion is given to me, and then I see him and examine him as soon as possible afterwards. I do not usually—the agent will see them one day, and it rarely happens I see them until the next day. Sometimes it will go two or three days before I see the applicant. Evidently I saw him the following day.

Q. Please state, doctor, what was Mr. Cable's condition of health at the time you made that examination?

Mr. Oppenheim: I object. There is no issue here as to Mr. Cable's illness or health at that time, nor any claim in their bill. If it is only for the purpose of showing his health at that time, we have no objection.

Mr. Porter: That is all.

A. He was in good health.

Q. On the second page of this paper, which is Mr. Cable's application, on the first page appears to be a medical examiner's report. Is that the part that you made at the time and signed at the time and returned to the company? A. It is.

Q. And correctly states the facts as you found them from examination? A. It does.

Q. On the third page of this same paper appears to be another medical examiner's report, made the 30th day of January, 1899, by Hugh T. Patrick. Do you know anything about that, doctor? A. He is an associate examiner. In large amounts it is the custom of the company to have two medical examinations.

Q. Do you know whether that is Mr. Patrick's signature to that report? A. Yes.

Mr. Porter: I offer that paper in evidence, and ask that it be marked Complainant's Exhibit 4.

(The paper was marked Complainant's Exhibit 4, and is attached hereto.)

Q. Doctor, you have heard Dr. Webster's testimony this morning, have you not, in respect to Herman D. Cable's condition between February 25 and March 2, 1899? A. I have.

Q. Please state whether or not in your judgment a person in the condition of Mr. Cable between those dates, as testified to by Dr. Webster, is in sound health and insurable condition? A. No.

Q. What would you say as to Mr. Cable's condition on Monday, February 27, 1899, as to whether or not he was in sound health and insurable condition in view of the facts as Dr. Webster has testified to them here this morning? A. He was not insurable.

Cross-Examination by Mr. Oppenheim.

Q. Doctor, did you see Mr. Cable sign both of these applications or simply the second one? A. I saw him sign both of them.

Q. Did you see him sign the first? A. Yes.

Q. Well, was Mr. Strong present at the time? A. I don't remember.

Q. Aren't you mistaken about that, doctor? Wasn't that brought to you, and the first application was already signed, and then when you took it there, why he signed the second application? A. Well, perhaps I may be mistaken about his signing the both. Of course, I am very sure about this.

Q. About the second? A. About the second. Whether Mr. Strong went with me or not—he sometimes goes with me, and it is completed then.

Q. Oh, don't you know that Mr. Strong wasn't present when you made the examination, or at any time that you saw Mr. Cable? A. I could not say about that. I was either introduced by Mr.

Deposition of Lyman Ware.

Strong or by some of the agents, because I have noted here, "Introduced by agent," but by whom I don't know; I can't remember.

Q. Now, do you now recollect as to whether or not this application was handed to you for the purpose of going and examining Mr. Cable, as to whether the first application was signed or not, at that time? A. Oh, I don't know anything as to that.

Q. Did you ever see Mr. Cable after making the examination? A. I don't think so.

Q. And you didn't know him before that time? A. No.

Re-direct Examination by Mr. Porter.

Q. Mr. Oppenheim has spoken of the first application. In order to straighten that out, doctor, do you mean by first application the beginning of the application, that part of it above the first signature? A. Yes. Of course I am not supposed to witness that. That is witnessed by the agent. But I am not clear about that first signature, but the second signature I know absolutely about.

Q. At the time, then, when Mr. Cable signed the second signature in your presence, the first signature had already been signed, or was signed there, one or the other? A. One or the other.

Q. It was either signed before he signed the second, or it was signed at the same time he signed the second? A. If I didn't see them sign their application I always asked them if the above signature is their signature.

Re-cross Examination by Mr. Oppenheim.

Q. Is it not usual for the application to be signed when it is brought to you, and then you go to the applicant, after the application is turned over to you by the agent? A. It is, but if you will allow me, in this case there are really two applications. There is the agent, he has an application over and above the application that appears there, and that is turned into the office direct, and then they sometimes, in a case of this kind, where there are large cases, and knowing the doctor to be somewhat diffident, they go with the doctor to introduce him.

Mr. Porter: I want to recall Mr. Finney, to show by him that he gave no authority to McCabe to deliver the policy to Lord. Mr. Finney, however, is out of town, and will not be here for a week or so, and subject to my right to call him at any time before the case goes to the master, I have no further evidence. I understand you gentlemen expect to call Mr. Lord, and have him here as a witness.

Mr. Miller: We cannot decide on any plan now. We will decide on that.

Mr. Porter: In case you do not, I will want to call Mr. Lord, and ask him a question or two, maybe a few questions, but with that exception I have finished.

Mr. Miller: We will wait until we have read the testimony all over. Of course, if we do not call him, and you desire to call him, we shall not object.

Whereupon, the further taking of testimony was continued until Monday, June 11, 1900, at 2 o'clock P. M.

2 o'clock P. M. June 28th, 1900

Parties met pursuant to adjournment.

Present:

Mr. Porter, solicitor for complainant.

Mr. Oppenheim, solicitor for defendant.

FAYETTE S. CABLE, was sworn as a witness in behalf of the complainant and testified as follows:

Direct Examination by Mr. Porter.

Q. What is your full name, Mr. Cable? A. Fayette S. Cable.

Q. What is your business? A. I am a manufacturer of pianos and organs.

Q. Are you connected with the Cable Piano Company? A. Yes, sir.

Q. Are you a brother of the late Herman D. Cable, deceased? A. Yes, sir.

Q. What was his relation to the Cable Piano Company? A. He was president of the Cable Piano Company.

Q. What is your connection with it? A. I am president of the Cable Piano Company.

Q. What was your connection with it in February, 1899? A. I was secretary of the company.

Q. Do you know Bernard Moore? A. Bernard Moore?

Q. Yes.

Mr. Oppenheim: Birney Moore.

Mr. Porter: Birney Moore—What was his real name?

A. Well, I have always know him as Birney Moore, or B. J. Moore. Birney, I think, his name is.

Q. You know him? A. Yes, sir.

Q. Where is he now? A. In California somewhere; I can't tell you where.

Q. Was he connected with the Cable Piano Company in February, 1899? A. No, sir.

Q. Didn't he have an office with the company? A. No, sir; not to my knowledge.

Q. What was his business at that time? A. I don't know what his business was at that time.

Q. Wasn't he an *habitue* of the Cable Company's office at that time? A. No, sir.

Q. Was he a friend of your brother, Herman D. Cable? A. They were neighbors, and I—yes, I think you may say they were friends; because he was a neighbor,.

Q. Do you recollect the circumstance of Mr. Lord calling up your office by telephone on the 27th day of February, 1899, to make some inquiries concerning an insurance policy? A. I do not.

Q. You remember the circumstance of your brother's illness? A. Yes, sir.

Q. That illness began February 24th, 1899, and he died Marc 27th; you recollect that? A. Yes, sir.

Q. Don't you recollect that George S. Lord, of Evanston, called up the office of the Cable Piano Company during the illness of your brother and made some inquiry as to whether the policy had been delivered or not? A. I don't think he called by telephone. If he called the office or not, he had no conversation with me.

Q. Didn't you have any knowledge of his calling up the office about that time? A. No, sir.

Q. Even if he did not call you up personally? A. No, sir. I don't recollect the circumstance.

Q. Didn't you at somebody's instance, during the illness of your brother, investigate among the papers of the company to find out whether or not the policy had been delivered? A. No, sir.

Q. Do you remember any conversation between you and Mr. Lord and Mr. Moore, relative to a policy which your brother, Herman D. Cable, had applied for to the United States Life Insurance Company?

(Objected to. Objection overruled.)

Q. During the illness of your brother? A. I don't recall the conversation between myself and those; if there was any it might have been some explanation in reference to his papers; but I do not recollect anything in reference to that matter.

Q. Don't you recollect having a conversation with Mr. George S. Lord during your brother's illness? A. No, sir.

Q. With reference to the policy which your brother had applied for in the United States Life Insurance Company? A. No, he didn't come to see me in reference to it that I remember.

Q. Well, did you go to see him? A. No, sir.

Q. Let me refresh your recollection a little, Mr. Cable. Don't you remember meeting Mr. George S. Lord and Mr. Moore at luncheon at the Union League Club during your brother's illness, at which his condition was discussed? A. I think it was Monday or Tuesday. I do not remember that Mr. Moore was down there on either of those days. I can't recollect that he was; and I don't remember whether I saw Mr. Moore at the club or not.

Q. March 2d, the date your brother died, was on Thursday? A. Yes, sir; I believe so; yes, Thursday morning.

Q. Don't you remember meeting Mr. Lord at luncheon at the Union League Club on the preceding Monday and taking luncheon with him and discussing your brother's illness with him? A. No, sir; I do not.

Q. Don't you recollect that Mr. Lord not only met you there and took luncheon with you, but told you, or asked you if the policy which your brother had applied for in the United States Life Insurance Company had been delivered or not? A. No, sir; he never said anything to me about that.

Q. Don't you remember discussing with him the advisability of getting a delivery of the policy? A. Not a word.

Q. You were told what your brother's condition was from day to day during his entire illness, were you not? A. I didn't know that my brother was sick, anything more than a cold, until Monday.

Q. What Monday? A. The Monday after he was taken sick. I had no more idea that he had pneumonia than nothing at all.

Q. Who informed you on Monday? A. Mr. Moore, from Evanston.

Q. Well, wasn't that the occasion when Mr. Moore and Mr. Lord together talked with you about your brother's condition? A. No, sir.

Q. Where did you meet Mr. Moore on that day when he gave you the information? A. I don't know; I don't recall whether he came to the store or not; or whether it was merely done by telephone; I think it was done by telephone. I can't recollect whether he was at the store or not; if he was there he was there for only a moment.

Q. Don't you remember that he made an appointment to meet you at luncheon the same day at the Union League Club? A. No, sir.

Q. Do you mean to say that this meeting, or alleged meeting, at the Uniton League Club did not occur, or simply that you do not recollect anything about it? A. I don't recall that I took luncheon with them that day. I have taken luncheon with Mr. Lord and Mr. Moore and Mr. Lacy, and a great many other people there; but I can't recollect whether I took luncheon with them or not.

Q. You were a member of the club at that time, were you? A. Yes, sir; I was.

Q. Was it your custom to go there and take lunch? A. Yes, sir; part of the time.

Q. Don't you remember of your discussing your brother's condition with Mr. Moore at any time during your brother's illness? A. I might have said something in reference to it; if I met him at the club I might have asked him how my brother was, and what he thought his condition was, etc., but I did not go into any detailed discussion that I remember.

Q. Did you know on that Monday, when you first heard of your brother's illness, that he had applied for a policy in the United States Life Insurance Company which had not then been delivered? A. I did not.

Q. Did you have any knowledge or information at any time during your brother's illness that he had applied for a policy previously in the company which had not been delivered? A. No, sir; I did not. I knew nothing about it whatever.

Q. You knew nothing about a policy in the United States Life Insurance Company until after his death? A. No, sir.

Q. Mr. Lord was an intimate friend of your brother's, was he not? A. An intimate friend?

Q. Yes, A. Well, they were both directors of the same bank, and had business together in common and interested in financial matters together. I don't know but you might say he was an intimate friend.

Q. Where is Mr. Lord now, if you know? A. I don't know; I haven't seen him for several days.

Q. Didn't you learn of the circumstance of the delivery of the policy in the United States Life Insurance Company before your brother died? A. No, sir.

Q. Didn't Mr. Lord ever talk to you about it? A. No, sir; not until afterwards; I knew nothing about it until this matter came up.

Q. Did you have any talk with Mrs. Alice M. Cable, the wife of your brother, about it? A. Not a word.

Q. Have you any other brothers, Mr. Cable, in Chicago? A. Yes, sir.

Q. Who are they? A. Herbert M. Cable, vice-president of the company.

Q. Do you know whether or not, or have you any information, that he had any discussion over the policy with Mr. Lord before your brother, Herman D. Cable, died?

(Objected to as incompetent. Objection sustained.)

Q. Did you hear of any conversation between Mr. Lord and your brother, Herbert M. Cable, with reference to a policy which Herman D. Cable had applied for? A. No, sir.

Q. Did Mr. Lord ever talk to you about a conversation that he had had with your brother, Herbert M. Cable?

(Objected to.)

Q. Where is your brother, Herbert M. Cable? A. In this city.

Q. That is all.

Mr. Oppenheim: That is all.

It is admitted by counsel for both parties in the cause that the defendant herein brought her action at law against the complainant in the Superior Court of Cook County, Illinois, on May 11, 1899, *to recover* $30,000 *upon the policy offered in evidence in this case, as the commuted value of such policy; that such action was begun by the filing of a praecipe and the issuance of a summons on said day, about an hour prior to the filing of the original bill herein: that such summons was placed in the hands of the sheriff of Cook County, Illinois, for service upon the defendant immediately upon its issuance, and prior to the filing of said original bill herein, but was not served upon the complainant herein until May* 15, 1899, *and that no direction to the sheriff to delay the service of summons was given by the plaintiff in said action at law, or her attorney, and that said action is still pending.*

Adjourned to 2 o'clock P. M., July 2, 1900.

July 2, 1900, 2 o'clock P. M.

Parties met pursuant to adjournment.

Present:

Mr. Porter, solicitor, for complainant.

Mr. Miller and Mr. Oppenheim, solicitors for defendant.

Deposition of George S. Lord.

GEORGE S. LORD, sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Miller.

Q. Your name is George S. Lord? A. Yes, sir.

Q. Where do you reside? A. In Evanston, Cook County, Illinois.

Q. How long have you lived there? A. Twenty-five years.

Q. What is your business in Chicago? A. Wholesale drug business.

Q. What is the name of your firm? A. Lord, Owen & Co.

Q. Were you acquainted with Herman D. Cable in his lifetime? A. Yes.

Q. How long have you known Mr. Cable? A. A great many years—fifteen or twenty.

Q. Were you and Mr. Cable intimately acquainted? A. Yes.

Q. Were you associated together in any matters? A. Yes.

Q. Socially and business? A. Yes.

Q. Of what bodies were you and Mr. Cable members officially? A. We were both of us directors of the Bankers' National Bank, and both of us members of the school board.

Q. At Evanston? A. At Evanston.

Q. At the time he died? A. Yes, sir. And our families were very intimate.

Q. State whether you and he were associated in business ventures outside of the Bankers' National Bank? A. Yes, we had a number of interests together.

Q. How long have you been so associated? A. Ten years or upwards.

Q. State whether or not in those business associations you and Mr. Cable had a running account during all those years or the greater part? A. Yes.

Q. State whether or not you saw Mr. Cable frequently for say two years prior to his death, and if so, how frequently? A. I saw Mr. Cable about twice a day, that is, when he left Evanston to come into the city, I would ride upon the same train with him, and was in the habit of coming home with him, and we frequently lunched together.

Q. State whether or not you were what you might call confidential friends? A. I think so; I think we were.

Q. Do you know the United States Life Insurance Company of New York? A. I know of it; yes, sir.

Q. Do you know one James F. McCabe, a solicitor of the United States Life Insurance Company? A. Yes.

Q. Do you recollect when you first became acquainted with Mr. McCabe as a solicitor for the United States Life Insurance Company?

(Objected to as assuming that he was a solicitor; question withdrawn.)

Q. State when you first became acquainted with Mr. McCabe, in relation to any business concerning the United States Life Insurance Company? A. Do I understand that to mean when I first met him regarding it?

Q. Yes. A. It was during the month of January, last year.

Q. 1899? A. 1899.

Q. Mr. Lord, you may state what business you had with Mr. McCabe in relation to the United States Life Insurance Company's policies. A. Mr. McCabe desired to place a policy on my life in the United States Life Insurance Company. He also informed me that he desired to place one on the life of Mr. Cable. I made out my application, was examined, and some time during the month of February, Mr. McCabe came to the office with the policy and stated that we were not under obligation to take it unless we desired to do so.

Mr. Porter: Whom do you mean by we, Mr. Lord?

A. Mr. Cable and myself.

Mr. Porter: I didn't understand you. You say that he had applied or that you had applied?

Mr. Miller: You don't mean that Mr. Cable had applied at that time—you speak of your own policy.

A. Well, I did say, Mr. Miller, that Mr. McCabe wanted to place a policy both on Mr. Cable and myself, and Mr. McCabe came to my office with the policy—

Q. With which policy? A. With my policy, and I asked him what the cash surrender of the policy was, and how strong the company was, as I was not familiar with it. He told me he would furnish me that information, and went out of the office. When he returned that same day there was someone engaged at my desk with me and he laid the policy on the desk with the literature containing answers to my questions, and remarked that he was going to leave the city for a week or ten days, and he would leave this with me, the policy and the statements, and when he returned I could

then decide whether I would take this policy or not. I have been trying to think of the date—

Q. Was it in February? A. I think it was in February. The last Monday in February he came into the office and wanted to know what I was going to do with that policy. I told him I would take the policy. During the week previous, that is, after he left the policy at my office, I met Mr. Cable, and Mr. Cable asked me what I was going to do about that policy, and I told him that I should probably take it. He then told me, "You do with my policy whatever you do with your policy." Mr. McCabe, when he was in my office that Monday afternoon—I asked him where Mr. Cable's policy was, and he said it was at the office. I told him, "If you will go and get that policy and bring it to me, I will pay for that policy and my policy —I will pay for Mr. Cable's policy and my own policy." He went out of the office, was gone a short time and returned with Mr. Cable's policy, and I paid him for mine and Mr. Cable's policy also. As he laid the policy on the desk, he said, "I suppose Mr. Cable is all right, isn't he?" I said, "No; Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." I paid him for both policies, and he went out of the office.

Q. Mr. Lord, in the conversations that you had with Mr. Cable after the applications had been made, state whether or not Mr. Cable desired you also to make investigation as to the standing of the company for himself, as well as for you? A. Yes.

Q. You have stated you did make such investigation? A. Yes.

Cross-Examination by Mr. Porter.

Q. Your policy and Mr. Cable's policy were applied for about the same time? A. Yes.

Q. They were for the same form and same kind of policy, were they not? That is, you applied for the same kind of policy that he did? A. I can't state from my own knowledge.

Q. Can you state from anybody else's knowledge? A. I only know what he got; he got the same thing.

Q. The two policies that were finally delivered were the same kind of policies? A. Yes.

Q. You stated, Mr. Lord, that you and Mr. Cable had a running account? What kind of running account did you have, and where did that account appear? A. It was more in the form of a vest pocket memorandum, than in a book. At the time Mr. Cable died I was owing him about $6,000, or more.

Q. That is, you mean that you had borrowed money for him and had part of it? A. No, sir.

Q. What do you mean by running account? A. In this particular instance, where I was indebted to Mr. Cable we had borrowed money of an eastern bank together—and I had the amount in bank for our joint account, at the time he died, in the vicinity of thirteen or fourteen thousand dollars.

Q. You hadn't made the investment? A. No.

Q. What I am trying to get at is what kind of a running account existed between you and Mr. Cable? A. Well, that is one account. We had that kind of cases right along. I had borrowed money for him a great many times. I was on about forty-five thousand or fifty thousand dollars of his paper at the time he died, and he was not on any on my account.

Q. So he had an account against you, but you didn't have an account against him; is that what you mean? A. Sometimes it was one way, and sometimes it was the other.

Q. How did it stand during the month of February, 1899? A. The same way. We had this money on hand for this particular purpose since the month of October previous, I think.

Q. Is that the only account that existed between you during the last week of February, 1899? A. That was all the loose money that I had.

Q. You mean that was all the loose money you had belonging to him? A. Yes.

Q. Did he have any loose money, or any other kind of money, belonging to you? A. No.

Q. What was the date, Mr. Lord, when Mr. McCabe first delivered you your policy and left it with you for examination; that is, I speak of the policy which you had applied for in the United States Life Insurance Company? A. I notice the policy is dated February 6th. It was soon after that date, but I couldn't give you the exact date. He stated he was going to be out of town a week or ten days, and on this particular Monday he appeared in the office; on what day it was that he left the policy on my desk, I couldn't exactly state now, but it was on my desk all the time he was away.

Q. You don't remember then whether—you couldn't say whether it was on the 21st day of February, 1899, or not? A. I couldn't say.

Q. You recollect, however, that it was a week before the day when the policy was finally delivered? A. No; I didn't so state.

Q. You do recollect that it was about a week before the final delivery of the policy? A. It must have been a week or more, I should say.

Q. Do you recollect the date when Mr. McCabe delivered the Cable policy to you and you paid for that policy, as well as your own policy? A. It was the last Monday in February, last year.

Q. That was Monday, February 27th, was it not? A. Yes.

Q. What time of the day was it that Mr. McCabe came to you on February 27, 1899? A. It was after lunch.

Q. Then it was, as I understand you, that you asked him if he had the Cable policy, and you asked him to go back to his office and get it? A. Yes.

Q. How long was he gone? A. I don't know just the time; possibly half an hour, or something like that; I didn't take particular account of it.

Q. Then he brought the Cable policy back? A. Yes.

Q. And he handed it to you, did he not? A. I can't say that he handed it to me; he did that or put it on my desk.

Q. You paid the first premium at that time upon both of those policies? A. Yes.

Q. How did you pay that premium? A. In currency.

Q. Then after that you said you had some talk with Mr. McCabe about the company, and about the company's financial condition? A. No, sir.

Q. You had no talk about it with him on that day? A. No, sir; not on that day.

Q. Isn't it true that you expressed some doubt to Mr. McCabe on that occasion as to whether the insured would have, under the terms of the policy, the option to take the commuted value? A. I said nothing to him about the terms of the policy at all on that occasion.

Q. Didn't you and Mr. McCabe sit down upon that occasion together, and go over the clauses of the policy one by one, for the purpose of ascertaining whether the option to take the commuted value of the policy instead of the several installments of benefits lay with the insured or with the company? A. We did not.

Q. Did not Mr. McCabe, in order to satisfy your mind upon that question, dictate to your stenographer a letter? A. Not at that time.

Q. Didn't that or a similar conversation occur at some other time? A. Something similar to what you speak of at some other time.

Q. What time was that? A. I can only tell by referring to a letter which I received back from another company in reply.

Q. Now, when Mr. McCabe brought to you the Cable policy, on the afternoon of February 27th, 1899, what was the first thing that was done after he laid the paper in front of you upon your desk? A. What was the first thing that was done?

Q. Yes. Did you then pay the money to him? A. I paid him the money right out.

Q. Then I understand you to say he made the inquiry as to whether Mr. Cable was all right? A. Yes.

Q. What was your reply to that? A. I said, "He has been sick for two or three days, but is no worse to-day than he has been for the last forty-eight hours."

Q. Is that all that was said between you and Mr. McCabe on that occasion? A. Essentially all.

Q. Was anything at all said? A. Nothing. I can't recall anything. That is as near the conversation as I can repeat it. That was about all the conversation, as I can recall. I haven't anything to conceal in the matter. I am willing to tell everything that occurred at that time that I can recall.

Q. You were familiar at that time with the provisions of both policies that were delivered that day and paid for, were you not? A. I can't say that I was.

Q. Didn't you know from your previous talk with Mr. McCabe? A. No, sir; I did not. My recollection is that it was after that date.

Q. Do you mean it was after that date when the policies were delivered and paid for? A. Yes.

Q. Prior to what occurred there? A. Well, that is my recollection. I can verify my recollection easily by referring to a certain letter that I have, which was returned by another company, which was dictated at that time.

Q. You have not that letter with you? A. No; I have not.

Q. I will ask you to look up that letter, if you have it, and produce it at the next session, so as to fix the date.

Q. Now, when was Mr. Herman D. Cable taken ill, previous to the delivery of the policies?

Counsel for the defendant objected to this question, as not cross-examination, and immaterial.

Q. When did you first learn of Mr. Cable's illness, previous to the 27th of February, 1899? A. February 24th.

Q. Do you recollect what day that was, Mr. Lord? A. Friday.

Q. Did you see Mr. Cable on that day? A. Yes.

Q. Where? A. I went down to Chicago with him on the train and came home that night with him.

Q. That is, you went with him on the train from Chicago to his home at Evanston? A. Yes; I went from Chicago to Evanston, and he drove me in his carriage to my house, and from there he was driven home.

Q. Was he ill at that time? A. He was not well. He complained of something, a chill or something of that kind. He seemed much better on the train going home, and when we got to Evanston, so much so that he drove me home.

Q. Didn't he send for you on that Friday afternoon to assist him home on account of his illness? A. No, sir.

Q. Did he visit you in your house at Evanston that Friday afternoon or evening? A. No.

Q. Did you see him again that evening? A. No, sir.

Q. Didn't you personally go and fetch to his house a trained nurse that evening? A. Yes.

Q. How did you come to do that? A. It was an accident. I telephoned over to his house to know how he was, and they replied that he was quite sick, and that they were trying to find a nurse. From my wife I learned that there was a nurse up in North Evanston, and I happened to know where this nurse lived, and I walked over to his house to tell whoever was going where the nurse lived, and I met Mr. Cable's carriage just in the porte cochere coming out, and whoever was in the carriage got out and inquired of me where she lived, and I said, "I know where she lives," and I went to this house and got the nurse and brought her there.

Q. That was on February 24th? A. Yes.

Q. What time was it? A. It was after dinner, about 7 or 8 o'clock in the evening.

Q. And didn't you go into Mr. Cable's house when you returned there with the nurse? A. I don't recall whether I went into the house or not; I may have done so.

Q. If you did go, you didn't see him? A. No, sir.

Q. Didn't you know at that time, before you brought the nurse there, that a physician had been called in and had diagnosed Mr. Cable's case as pneumonia? A. No, sir. I might have known that a physician had been called, but I did not know what the trouble was.

Q. You learned soon afterwards, after you brought the nurse there, that the physician had diagnosed Mr. Cable's case as pneumonia, didn't you? A. I can't say that I learned of that the same day.

Q. You knew of it the next day? A. I can't tell you when I was aware of it; I don't recall.

Q. Did you go and make inquiries at Mr. Cable's house respecting his condition on the next day? A. Yes.

Q. Weren't you in daily attendance at his house during his entire illness, from that time on, and anxious about his condition?

A. I would either telephone to the house or go over myself. He was a very dear friend of mine, and I wanted to know if I could do anything for him.

Q. You made inquiries there sometimes twice a day, morning and evening, did you not? A. Yes, and telephoned over this Monday morning, before I came to town, before I came down to the city. On this particular day word came to me from Mr. Moore, who had just been over to the house—he lived next door—he said that he went in by the back door and everybody was sleeping, and Mr. Cable was asleep, and the nurse was asleep, and he had been able to take food and that he was feeling very much better about it.

Q. When was that? A. That was Monday morning.

Q. Previous to that you had talked with the physicians attending Mr. Cable, had you not? A. No, sir.

Q. Hadn't you talked with them or with some member of the family with reference to Mr. Cable's condition? A. I can't tell, Mr. Porter, just whom I talked with. I might have talked with members of the family.

Q. You knew what was the matter with him, then, didn't you? A. Yes, I did.

Q. Previous to Monday? A. Previous to Monday; yes, sir.

Q. You knew it was pneumonia? A. Yes.

Q. Monday morning, February 27th, you say you went to Mr. Cable's house and made inquiries of some member of the family? A. I did not say so.

Q. Oh, I beg your pardon. A. I said I telephoned.

Q. You telephoned to somebody and asked about his condition? A. As I recollect, I telephoned to Mr. Moore's house, who lived next door, and he said he had just been over to Mr. Cable's house. I did not telephone to Mr. Cable's house directly.

Q. You knew that it was a very serious disease to have, didn't you? A. Yes, sir.

Q. Now, where did you telephone from Monday morning, February 27th? A. From my own house.

Q. In Evanston? A. Yes.

Q. Before you came to the city? A. Yes.

Q. Then did you come into Chicago afterwards? A. Yes.

Q. What did you do when you got here, if anything, with reference to the Cable policy? A. I didn't do anything.

Q. Didn't you have any conversation with anybody? A. No, sir.

Q. With refernce to that policy? A. No, sir.

Q. Didn't you call up on the telephone Mr. Cable's business

place and inquire whether the policy had been delivered there, that is, the policy which he had applied for in the United States Life Insurance Company? A. No, sir; I don't remember any such inquiry, and I think I would remember it.

Q. Weren't you informed by somebody at his office that they had made search for it among the papers there and had not found any such policy? A. No, sir.

Q. Where did you take luncheon on that day? A. Well, really, I can't say. I might have taken luncheon at the Union League Club. I frequently go there.

Q. Didn't you take lunch that day with Mr. Moore and one of Mr. Cable's brothers at the Union League Club, where the question of this policy in the United States Life Insurance Company, which Mr. Herman D. Cable had applied for, was discussed? A. I never took lunch with either of the Cables, F. S. Cable or H. M. Cable, that I can now recall.

Q. Did you take lunch that day with Mr. Moore, and have such a discussion as I have mentioned? A. I can't say whether I took lunch with Mr. Moore or not, but we had no discussion. It was a matter of a year or so ago.

Q. Now, are you sure of what you are testifying, or is it that you simply don't remember? A. About what?

Q. About the lunch with Mr. Moore or Mr. Cable on February 27th, 1899, when the question of this policy was discussed? A. You asked me, as I understand the question, whether I took lunch with one of the Cables and Mr. Moore on February 27th, when this policy question was discussed. I said I never took lunch with either of those gentlemen in my life, that I can recall; that is, the Cables; and I couldn't say positively whether I took lunch with Mr. Moore on that day or not; but I do so not unfrequently. But as for discussing the question of the policy, we did not.

Q. Did you have any discussion with anybody on Monday, February 27th, prior to the delivery of the policy by McCabe to you with reference to the Cable policy? A. I don't recall any discussion at all. I will tell you this much, I didn't know McCabe's name; I didn't know where his office was, and he just happened to come into the office on that day after lunch.

Q. Didn't you have a conversation with Mr. Horace Bennett, in the presence of Earnest A. Main, on Monday morning, March 6th, 1899, in which you stated to those gentlemen that on the day you received the Cable policy you took lunch at the Union League Club with one of Mr. Cable's brothers and Mr. Moore? A. No; I did not. I remember somebody by the name of Bennett and a man whose

name I did not know; the two men came into the office and inquired around in an obscure sort of way about this Cable policy. I couldn't understand what they were trying to get at, and I said, "Gentlemen, there is nothing to conceal about this; I will tell you the whole story."

Q. And you told them the story? A. I told them the story, but I did not tell them that.

Q. Those were the gentlemen that had come from the United States Life Insurance Company? A. I didn't know where they were from, those two men. I do not recall of ever having met them before. I think I had never met them before.

Q. McCabe was at your store on the Friday previous, in this city? A. Yes.

Q. Didn't you tell Mr. Bennett and Mr. Main—those two gentlemen at that time, that during a conversation which you held with one of Mr. Herman D. Cable's brothers and with Mr. Moore at the Union League Club, at lunch on February 27th, you discussed the policy of insurance which Herman D. Cable had applied for, and told Mr. Moore and Mr. Cable that you thought you could get it, and they both advised you to get it? A. No; I did not.

Q. Didn't you at that time tell Mr. Bennett and Mr. Main that even if you had not seen Moore and Herman D. Cable's brother at lunch, you would have paid the premium and got the Cable policy on your own responsibility? A. No.

Q. And didn't you say that as one reason why you would take it on your own responsibility, Cable's illness might leave him with some disability so that he could not, even if he pulled through, afterwards take out insurance? A. I don't remember any such conversation.

Q. Do you say that you did or did not, or simply that you don't remember? A. I don't remember that I did say that, or anything like it.

Q. Didn't you say something to that effect, Mr. Lord? A. I don't recall having said anything to that effect at all.

Q. Do you remember having a conversation with Mr. James H. Strong and Horace C. Bennett, representatives of the United States Life Insurance Company, on the next day, March 7, 1899, at the Bankers' National Bank? A. I remember having a conversation with Mr. Strong, but Mr. Bennett was not present in that conversation. Mr. Strong tendered me the amount of premium that had been paid, and that was essentially all there was to it.

Q. Didn't you tell Mr. Strong in that conversation that on Sunday, February 26th, Mr. Herman D. Cable was in a very serious condition? A. I did not.

Deposition of George S. Lord.

Q. Didn't you state in that conversation to Mr. Strong and to Mr. Bennett, or to one or the other of them, that on Monday morning, February 27th, after you came into Chicago from Evanston, you called up Mr. Bernard Moore by telephone and asked him to go to Mr. Cable's vault, where his papers were kept, and ascertain if the policy for $50,000, that Herman D. Cable had applied for, was among his papers and to notify you at once? A. I did not; no, sir.

Q. Didn't you also tell Mr. Strong at that same conversation, that after the talk which you had with Mr. Moore and one of Herman D. Cable's brothers at the Union League Club, it was agreed between you three that you should obtain the policy and pay the premium thereon, if you could get it? A. No; I did not.

Q. Didn't you telephone to Mr. Bernard Moore on Monday morning, February 27th, before you left Evanston, and asked him to ascertain whether Herman D. Cable's policy was among Herman D. Cable's papers? A. I did not.

Q. Did you have any conversation with anybody on Monday, before you saw McCabe about the Cable policy, either over the 'phone or by word of mouth? A. I don't remember any conversation about the policy at all.

Q. You paid for the Cable policy when it was delivered to you, on February 27th, with your own funds over in your store? A. Yes; with my own funds.

Q. What did you do with it, after you got it? A. The policy?

Q. Yes; the Cable policy. A. I took it home with me on the train that evening, and delivered it to some member of Mr. Cable's family, that evening.

Q. Do you remember what member of the family? A. There were quite a number of them there.

Q. Didn't you deliver it to Mrs. Cable, the wife of Herman D. Cable? A. I might have done so. I think I delivered it to his mother-in-law, Mrs. Cable's mother, or her sister, or Mr. Shaw; I can't tell just which. It went inside of the house; I know that.

Q. You delivered it then, either to the wife, or her mother or sister? A. With some member of the family.

Q. Left it with her? A. Yes.

Q. After you left it there, did you have any conversation about it with anybody, prior to Mr. Cable's death? A. I don't recall any conversation with anybody.

Q. Did you ask Mr. Moore, or any member of Mr. Cable's household to whom you delivered the paper, to tell you who would reimburse you for the first premium that you had expended? A. No, sir.

Q. Did you ever get the first premium back? A. Yes.

Q. When? A. I don't recollect.

Q. How did you get it back? A. I got it back in some way; I don't remember how.

Q. Who paid it to you, if anybody? A. It might have been Fayette Cable.

Q. Well, do you remember that it was paid back to you? A. Yes; it was paid back to me.

Q. But you don't remember who paid it, or how it was paid back? A. It was probably paid back—I don't know who gave it to me, I don't recall. It might have been Mr. F. S. Cable, or it might have been Mr. H. M. Cable, or Mr. Shaw might have given it.

Q. Did you ask anybody to pay it back to you? A. I don't know whether I did or not; they might have volunteered to pay it back to me; I couldn't say as to that.

Q. Can you tell when about it was? A. No, sir; I cannot.

Q. It was after Herman D. Cable's death? A. Yes.

Q. The payment of the money would appear on your books of account, wouldn't it? A. No.

Q. It would not? A. No.

Q. Have you any books or memoranda which would refresh your recollection as to the time when the first premium was paid back to you? A. No, sir. If they paid it they probably have got a memoranda of it. I have not.

Q. When it was paid to you, didn't you give anybody credit for it in any book or on any memorandum? A. No, sir; it was my personal matter, it was not a firm matter.

Q. Wouldn't your bank deposit book show that? A. It might; I can't recall just exactly in what way it was paid: I would be very glad to tell you, if I knew.

Q. Did you make any charge upon your books of that first premium? A. No, sir; it was my own personal matter; it was my own funds that I paid it with, and I don't keep any books of my personal matters.

Q. You knew, didn't you, on Monday, at the time the policy was delivered to you, that Mr. Herman D. Cable was not in an insurable condition; not in sound health? A. Well, I knew that he was better than he had been, for the last two or three days.

Q. Well, but that don't answer the question. A. Well, that is my answer.

Q. Did you not know that he was not in an insurable condition? (Objected to as calling for a conclusion of law.)

A. I am not a physician, and had not seen Mr. Cable.

Q. You didn't know whether he was or not? A. I hadn't seen Mr. Cable, and didn't know of my own knowledge, no.

Q. You carry a great deal of life insurance yourself, don't you? A. Yes; I carry some.

Q. You have made many applications? A. Yes.

Q. Did you have any idea at that time that any insurance company would insure a man in the condition that Mr. Cable was in? A. Well, that did not occur to my mind at that time.

Q. Well, had you any doubts as to the propriety of procuring the policy at that time?

(Objected to; objection overruled.)

A. Not the slightest; not the slightest.

Q. As a business man and familiar with life insurance matters, did you suppose that life insurance companies issued policies on men who had pneumonia?

(Objected to as assuming the issuance of the policy and a improper; objection sustained; exception by complainant.)

Q. You knew at the time Mr. Cable applied for this policy that he was not in good health, did you? A. Yes.

Q. You knew at the time you got it from McCabe that he had pneumonia and was at home sick in bed? A. Yes.

Q. Did you ever make any claim against the estate of Herman D. Cable, deceased, for the first premium which you paid upon the Cable policy? A. No.

Q. Where is Mrs. Alice A. Cable, widow of Herman D. Cable, the administratrix of his estate, at the present time? A. I think she is at Innsbrook, Tyrol, Austria.

Q. She is abroad? A. Yes.

Q. Do you know when she expects to return? A. I do not.

Q. That is all.

H. H. C. MILLER was sworn as a witness in behalf of the defendant, and testified as follows:

Direct Examination by Mr. Oppenheim.

Q. State your name for the master? A. H. H. C. Miller.

Q. You are an attorney at law in the City of Chicago? A. Yes, sir.

Q. And have been for how many years? A. About twenty-five years.

Q. You were acquainted with Mr. H. D. Cable in his lifetime? A. I was.

Q. Do you know the witness, J. F. McCabe, who has been on the stand in this case? A. I met Mr. McCabe twice before his appearance before the master in this proceeding, and twice only, so far as I recollect.

Q. When was the first time that you ever met Mr. McCabe? A. The first time was March 3, 1899.

Q. Where did you meet him, and under what circumstances? A. On that day, a little before 12 o'clock. Mr. George S. Lord came to my office in the Marquette Building, and he said that he had referred a Mr. J. F. McCabe to me concerning the Cable policy or the policy that had been issued to Herman D. Cable—

The Master: When was this?

A. This was March 3, 1899—and that inasmuch as the discount committee was down stairs in the Bankers' National Bank he must hurry back. This conversation occurred while he stood in the door of my office talking to me; and he disappeared. Shortly afterwards a gentleman came in and handed me his card, introduced himself to me as J. F. McCabe. This was about 15 minutes past 12 of that day. He then had a conversation with me which I wrote down immediately afterwards or dictated it to my stenographer immediately after he left my office on that day. And the notes are here in my hand now, and from which I would refresh my recollection.

Q. What was said to you by Mr. McCabe and what did you say to him in regard to the delivery of the policy by him to Mr. George S. Lord? A. The conversation was substantially as follows:

Mr. Porter: Let me ask you—have you any recollection of the conversation independently of that paper?

A. I have, but not as accurately as I would have after refreshing my memory from this as to the exact words used; but I have a very distinct recollection of the conversation, and can state it substantially without this paper, but I think I can from this paper give the exact words used by Mr. McCabe.

Q. (Previous question read.)

Mr. Porter: I object to the question in that form, as no conversation between Mr. Miller and Mr. McCabe is competent here except for the purpose of impeaching Mr. McCabe. Now, if that is the purpose, to impeach Mr. McCabe, they must follow the language of McCabe—in asking questions.

Mr. Oppenheim: You are right, technically. Mr. Miller, in that conversation referred to, on the 3rd day of March, I will

ask you whether or not Mr. McCabe said to you and you said to him as follows: "(McCabe) I therefore went to Mr. Lord's office on Monday, and asked him about his own and the Cable policy; he was very busy, and said, 'Have you the Cable policy?' I replied, 'No; but I will go and get it.' I then went directly to the office, got the policy, and went back to Mr. Lord's office. I said to Mr. Lord, 'Is Mr. Cable all right—' meaning is he in good health. Mr. Lord replied, " 'He has not been very well for two or three days, and is at home; I think he is as well as he has been during the past forty-eight hours.' I thereupon told Mr. Lord that I would like to deliver the policy to him for Mr. Cable and have the premium paid, as we wanted to make our report on all policies before the close of the month. Thereupon Mr. Lord took the policy and paid me the premium." I will ask you whether he did not state that to you on that day?

A. He did.

Q. When was the second conversation you had with Mr. McCabe, as you now recollect? A. I can't give the date, but my recollection is it was the day or the day before the first hearing in this matter before the master, when Mr. McCabe testified.

Q. State whether or not you sent to Mr. McCabe to come to the office? A. I did not.

Q. Did you know anything about his intending to come to the office before he appeared? A. I did not.

Cross-Examination by Mr. Porter.

Q. Mr. Miller, before you had the conversation with Mr. McCabe, on March 3rd, 1899, had not Mr. Lord talked with you about a conversation which he had had with McCabe at the time the policy was delivered? A. Only that day, as he came and spoke to me at the door, and spoke about McCabe coming there.

Q. Did he say anything about what took place between him and McCabe at the time the policy was delivered? A. No, sir. He was not there to exceed three minutes. He just said that he was coming—Mr. Lord came to the door and stood close by the door and said, "Miller, I am going to send you a visitor; I have got to go down to the discount committee; this man McCabe, who delivered the Cable policy, and who gave me the policy, is going to raise a question as to the validity of the policy; and I told this man McCabe to come and see you." I think that is about all the conversation that occurred.

Q. Mr. McCabe's version of the interview between himself and

Mr. Lord at the time the policy was delivered, was the first version you heard? A. The first version I heard; yes, sir.

Q. How soon after the conversation closed between you and Mr. McCabe on that date did you dictate the notes of the first conversation to your stenographer? A. Immediately after he left the office I called in my stenographer and dictated the conversation which I have in this form, and then filed it away in my private box, where it remained until the time Mr. McCabe came in. The last time I saw him, to which I refer here at this hearing, was, I think, the day you examined him, or the day before.

Adjourned to 2 o'clock, July 3rd, 1900.

September 19, 1900, 2 o'clock P. M.

Parties met pursuant to adjournment.
Present, same as before.

ERNEST K. MAINE, called as a witness on behalf of the complainant, in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. What is your full name, Mr. Maine? A. Ernest K. Maine.

Q. Do you live in Chicago, Mr. Maine? A. Yes, sir.

Q. What was your occupation during the month of March, 1899? A. I was practicing law.

Q. Were you practicing law on your own account, or were you connected with somebody else? A. I was a member of the firm of Butler, Fletcher & Maine.

Q. Are you acquainted with Mr. George S. Lord of this city? A. I saw him once, I believe.

Q. Are you acquainted with Mr. H. C. Bennett of this city? A. Yes, sir; he was a member of the firm of Butler, Fletcher & Maine.

Q. State whether or not you and Mr. Bennett together had an interview with Mr. George S. Lord on Monday morning, March 6th, 1899? A. We did.

Q. Where did this interview take place? A. At the offices of Lord, Owen & Co. on Wabash avenue.

Q. State what was the occasion of your going to that place and having that interview? A. Mr. Bennett asked me to accompany him while he had a conversation with Mr. Lord in regard to the Cable policy.

Q. State whether or not to that interview Mr. Lord told you and Mr. Bennett that on the day he, Mr. Lord, had received the Cable policy—the policy upon the life of Herman D. Cable, deceased, from a Mr. McCabe, he, Lord, had taken lunch at the Union League Club with one of Herman D. Cable's brothers and Mr. Birney Moore?

Mr. Oppenheim: That is objected to upon the ground it is immaterial.

A. As I remember it, he said Mr. Cable and Mr. Moore, and I don't know who it was—

Mr. Oppenheim: Wait a moment. I objected to it upon the grounds that the fact itself is immaterial, and that you cannot impeach a man upon an immaterial fact.

The Master: He may answer.

(Exception by solicitor for defendant.)

A. As I remember it, he stated that it was one of Mr. Cable's brothers and a Mr. Moore.

Mr. Porter: Q. Well, did Mr. Lord state at that time that on the day when the Cable policy was delivered to him, Lord, he, Lord, took lunch with one of Herman D. Cable's brothers and a Mr. Moore at the Union League Club? A. He did.

Q. State whether or not, on that same occasion, Mr. Lord told you and Mr. Bennett that at that lunch at the Union League Club, he, Lord, had discussed the matter of obtaining from the United States Life Insurance Company the Herman D. Cable policy, and that Mr. Moore and Herman D. Cable's brother, who was at the lunch, advised him, Lord, to get it?

Mr. Oppenheim: Objected to upon the same ground. The question calls for an immaterial fact.

The Master: He may answer.

A. He did.

Mr. Porter. Q. Did not Mr. Lord, on the same occasion, tell you and Mr. Bennett that he would have paid the premium upon the Herman D. Cable policy and received it on his own responsibility, even if Cable's brother and Moore had not advised him to get it?

Mr. Oppenheim: Objected to upon the same ground as above stated.

The Master: He may answer.

A. He did.

Mr. Porter: Q. And didn't Mr. Lord tell you and Mr. Bennett on the same occasion, that the reason why he would have taken it on his own responsibility was that Cable's illness might leave Cable with some disability, so that he, Cable, could not, even if he pulled through afterwards and lived, take out other insurance?

Mr. Oppenheim: Objected to on the ground that it is an immaterial fact.

The Master: He may answer.

A. He did.

Mr. Porter: Q. You may state, Mr. Maine, if there is any particular reason why you are enabled to remember these facts, and what that reason is?

Mr. Oppenheim: I object to that. It is trying to bolster up the witness' testimony. The witness has testified to the facts. That is sufficient, I take it, without attempting to bolster it up with some outside document.

The Master: I think he is entitled to it.

A. Upon Mr. Bennett's request, as soon as we returned to our office in the Fort Dearborn Building, I immediately wrote out the conversation which we had just previously had with Mr. Lord.

Mr. Porter: Q. And you have refreshed your recollection from that writing? A. Yes, sir; and I have refreshed my recollection from a type-written copy of those notes, signed by me on that date.

Q. You have in your hand, have you not, the original paper that you wrote at that time, March 6th, 1899? A. This is a type-written copy, which I signed.

Cross-Examination by Mr. Oppenheim.

Q. Mr. Maine, you say that you went there at the request of Mr. Bennett? A. Yes, sir.

Q. For the purpose of obtaining what? A. For the purpose of listening to the conversation of Mr. Bennett and Mr. Lord.

Q. Had Mr. Bennett a bill to collect at that time against Mr. Lord? A. He did not say so to me; he just asked me to go along with him and listen to the conversation.

Q. Were you paid? A. I was a member of the firm of Mr. Bennett. We were partners together.

Q. Did Mr. Bennett state to you the purpose for which he desired to go to see Mr. Lord? A. He informed me that he wished me to be a witness to the conversation.

Q. Did he tell you that you had been employed by the United States Life Insurance Company to procure evidence? A. He did not.

Q. Do you know whether or not your firm was employed by the United States Life Insurance Company to go to Mr. Lord for the purpose of procuring evidence to defeat this policy? A. I do not.

Q. Do you know whether or not your firm was paid anything for the purpose of getting this evidence and testifying in this case? A. I am unable.

Q. You are an attorney at law? A. I was and I am now.

Q. Do know what your business was— A. Practicing lawyers.

Q. —what your business was when you went to see Mr. Lord for the purpose of procuring this testimony, and what it was to be procured for? A. The matter was not talked over between Mr. Bennett and myself at that time.

Q. Has it been subsequently? A. It has not.

Q. Do you now know whether or not your firm were employed, or any member of your firm was employed to go to see Mr. Lord for the purpose of impeaching him upon the trial of this case? A. Do you mean whether we were paid for it, or whether we were employed to go and get it or not?

Q. The question is there. (Question read.) A. I do not.

Q. Has your firm received any money from the United States Life Insurance Company, or any of its agents, in procuring this testimony by yourself or by Mr. Bennett? A. I don't know.

Q. Have you ever received any compensation for your services, either in giving testimony or in going to see Mr. Lord in order to get the testimony? A. I am unable to state.

Re-direct Examination by Mr. Porter.

Q. How is it, Mr. Maine, that you do not remember about this compensation matter that Mr. Oppenheim asked you about?

Mr. Oppenheim: I object to the question; he has not stated he don't remember about compensation.

Mr. Porter: Q. How is it that you could not state, then, about the matter? A. The law firm of Butler, Fletcher & Maine dissolved July 1, 1899, at which time I was home on a vacation. A check was mailed to me for the amount that was due me, and the items which made up the amount of money I am unable to state.

Q. You mean that a check was mailed you— A. For the whole amount, and I left it to Mr. Butler to get my share and send it to me, that is all.

Q. That is, for the amount due you in connection with the firm business? A. In connection with the whole law firm when we dissolved, and I don't know whether that was in it or not. I never kept any books of it. I just trusted to their honesty.

Q. Was any money ever paid to you personally in connection with this Cable business by the United States Life Insurance Company? A. There was not.

Q. So you don't know, then, whether any money was ever paid to anybody in connection with this Cable business? A. I do not.

HORACE C. BENNETT, called as a witness on behalf of the complainant in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. Your full name, Mr. Bennett? A. Horace C. Bennett.

Q. You are a practicing lawyer in Chicago? A. Yes, sir.

Q. Were you practicing here in March, 1899? A. Yes, sir.

Q. Are you acquainted with Mr. George S. Lord, of this city, a member of the firm of Lord, Owen & Co.? A. Somewhat; yes, sir.

Q. Are you acquainted with Ernest K. Maine, and were you in March, 1899? A. Yes, sir.

Q. What was Mr. Maine's connection with you at that time? A. Mr. Maine was my law partner at that time, a member of the firm of Butler, Fletcher & Maine.

Q. Did you and Mr. Maine together have a conversation with Mr. George S. Lord, on Monday morning, March 6, 1899, at the office of Lord, Owen & Co.? A. We did—or I did.

Q. You went there, I believe, to have an interview with Mr. Lord, and took Mr. Maine along with you? Is that the way it occurred? A. That is the way it occurred.

Q. Didn't Mr. Lord state to you at that interview that on the same day he had received from a Mr. McCabe the policy on the life of Herman D. Cable, deceased, he, Lord, had taken lunch at the Union League Club with one of Mr. Herman D. Cable's brothers and a Mr. Moore? A. Yes, sir.

Q. At that same interview didn't Mr. Lord tell you that during that luncheon at the Union League Club he, Lord, had discussed the matter with Herman D. Cable's brother and Mr. Moore, of obtaining possession and delivery from the United States Life Insurance Company of a policy which that company had written on the life of Herman D. Cable, but which had not been yet delivered?

Mr. Oppenheim: Objected to on the ground that the evidence sought to be elicted is immaterial, and one on which the witness cannot be rebutted.

The Master: You may answer.

A. He did.

Mr. Porter: Q. At that same interview, didn't Mr. Lord tell you that he told Mr. Moore and Mr. Cable's brother that he thought he could get that policy, and that they, Mr. Moore and Mr. Cable's brother, advised him to get it if he could? A. He did.

Deposition of Horace C. Bennett.

Cross-Examination by Mr. Oppenheim.

Q. Who was present at the time this conversation was had with Mr. Lord? A. Mr. Maine and Mr. Lord's partner.

Q. Mr. Owen? A. I should think so; yes, sir. Yes; I know it was.

Q. How did you happen to go there, Mr. Bennett? A. I went there for the purpose of stopping the delivery of the policy, in pursuance of an investigation—in investigating the condition of affairs, and to ascertain the relations of the parties, and what had been done in reference to securing the policy upon the life of Herman D. Cable, who had been reported to have died the Saturday—Friday or Saturday preceding.

Q. At whose request did you go there? A. Joseph H. Strong.

Q. The agent of the— A. The agent or general manager of the United States Life Insurance Company of this city, sitting in this room.

Q. You were paid for that service? A. We were paid for that service.

Q. You went there further for the purpose of procuring such evidence as you could, did you not? A. We did not.

Q. Why did you take Mr. Maine along with you? A. I had, in the previous investigation, sufficient evidence to satisfy my mind that there had been a disposition on the part of Mr. Cable's friends to secure a policy, and, as I said to Mr. Maine, I wanted him to go with me, so as to be present at the conversation I had with Mr. Lord, who, I had been told, had secured the policy and paid the premium, while Mr. Cable was dying, or was sick nigh unto death; and I thought one witness, and a good one, was rather essential.

Q. Why did you want a witness there? A. Because I hadn't any confidence in George S. Lord, after I had been told what he had done.

Q. You had your mind very firmly fixed as to the rights of the case, and as to whether or not that policy could be enforced? A. I did not, sir. I was on an investigation, and my mind was not fixed at all.

Q. Upon this investigation, did you expect to give any testimony as to what the result of your conversation with Mr. Lord was? A. I did not; hadn't the remotest idea that I would ever be called upon to testify.

Q. Then why was it that Mr. Maine was taken with you for the purpose of bolstering up your evidence? A. He was not taken with me for the purpose of bolstering up my evidence.

Q. You could understand the English language, could you not?

A. You asked me the question why was he taken with me for the purpose of bolstering up my evidence. I understand the English language and I reply he was not taken with me for the purpose of bolstering up my evidence.

Q. Did you expect to testify as to anything that was said between you and Mr. Lord? A. I did not. I had not the remotest idea that I would be called upon to testify.

Q. Then why did you want Mr. Maine with you? A. Mr. Maine was a junior partner in our firm, and in making this investigation, it was in my mind that there might be a law suit. I desired Mr. Maine to go along with me so that he might be advised as to what conversation took place then and something of the nature of the case.

Q. Could you not yourself have obtained all this information that you desired, without Mr. Maine's presence? A. Undoubtedly I could.

Q. Is it your practice, when making an investigaton of that kind, to take Mr. Maine or any person along with you? A. I decline to state what my practice is in regard to this case, unless required to answer by the court. My practice in regard to my general practice cuts no figure in this case.

Q. I insist that the question is a proper one and ought to be answered.

Mr. Porter: I think that is a very pertinent objection on the witness' part, Mr. Master. His practice is immaterial here.

The Master: I think it is a proper question. I think he should answer it.

(Question read.)

A. I never made an investigation of this kind before in my life, and hence I never took anyone along with me before.

Mr. Oppenheim: Q. You say you were employed by Mr. Strong to see whether you could get a return of this policy. Is that correct? A. Substantially correct, sir.

Q. And that was your sole object in going there? A. I don't think so.

Q. What other object did you have? A. To render such services to Mr. Strong as he requested me to render to him. When he came to me he said he thought—

Q. I am not asking you what he said he thought. I am asking you what other object he had? A. Don't have anything more than you want.

Q. Please answer the question: don't make a stump speech. A. That is all right.

(Question read.)

Q. I am asking you what other object you had besides procuring that policy, not as to a conversation between Mr. Strong and yourself.

The Witness: You may consider your question answered, if you want.

Q. Mr. Witness, do you decline to state what other object you had outside of attempting to procure a policy? A. No, sir.

Q. Then please state what it was. A. Mr. Strong directed me—

Q. I object to your stating what Mr. Strong directed you. I am asking what your objects were; not what the conversation between you and Mr. Strong was.

Mr. Porter: You have already stated you were acting under Mr. Strong's directions there.

Mr. Oppenheim: I object to this interjection by counsel.

Mr. Porter: I think it is quite proper for a witness—he has already stated he was carrying out Mr. Strong's directions.

The Master: I think he may answer the question as put, without stating any conversation between himself and Mr. Strong.

The Witness: Well, put the question again.

Mr. Oppenheim: Q. What other objects did you have in going to see Mr. Lord and having a conversation with him in the presence of Mr. Maine, besides the procurement or the return of this policy?

The Witness (addressing the stenographer): What answer did I give?

Mr. Oppenheim: I object to this evidence being read over to the witness again.

The Master: I think he has a right to have it read.

Mr. Oppenheim: I desire to note an objection on my part to the reading of the testimony of the witness heretofore given, in order that he may answer this question.

(The stenographer then read the latter part of the witness' testimony.)

The Witness: The ruling is I cannot state that Strong gave me directions—

The Master: You cannot state any conversation between Mr. Strong and yourself. You may state what your object was.

A. I had learned—

Mr. Oppenheim: Q. I object to what you had learned. You can state what your object was, not what you had learned from somebody else. If you had any other object than the going to Mr.

Lord and the procuring of this policy from him, or having it returned to the United States Life Insurance Company, please state what that other object was. A. To stop an apparent fraud which was being perpetrated upon the United States Life Insurance Company.

Q. How did you expect to stop, other than the getting the return of the policy, by going to Mr. Lord's office and taking Mr. Maine with you? A. The last that I have heard—

Q. I have stated that I did not ask you for what you had heard. I asked you what your objects were in going to see Mr. Lord and taking Mr. Maine with you. I object to your stating what you had heard from anyone else.

The Master: The objection is sustained.

A. To ascertain, if possible, by conversations with George S. Lord, who assisted him or who was connected with him in procuring from the agent of the United States Life Insurance Company a policy of insurance upon the life of H. D. Cable, while he and others knew that Cable was either dead or had been pronounced to be beyond hope of recovery.

Q. That is, to procure testimony? A. To learn from him who the parties were that were connected with him in securing this policy of insurance upon the life of Herman D. Cable, who was lying dead or unconscious.

Q. Was it for the purpose of procuring testimony? A. It was for the purpose, so far as I am able to answer at this time, of procuring the facts attendant at the time.

Q. Was it your purpose to procure testimony for the purpose of impeaching Mr. Lord? A. No, sir.

Q. What avail was it for you to take Mr. Maine along with you, if your sole idea was to procure the names of others who might have assisted Mr. Lord in securing this policy?

Mr. Porter: I object to that. The witness has gone all over that, if the master please, two or three times, and has answered that question clearly.

Mr. Oppenheim: Not to my satisfaction, nor, I believe, to the master's.

The Master: I think he may answer.

A. I should answer that, at this point of time, that I thought, as I recollect it, the matter was of sufficient importance to warrant giving it the best attention possible. I do not recollect what particular thought I had in my mind. I asked Mr. Maine to go with me, and stated to him briefly what I had in my mind on the way down there from the office, and when I asked him, I did it on the impulse of the moment, as I recollect it, without any premeditation.

Depoiition of Joseph H. Strong.

Q. As soon as you returned, both of you dictated, did you not, the result of your interview, and signed the statement? A. I don't know when Mr. Maine dictated his. I think that I dictated my letter to Mr. Strong or the United States Life Insurance Company that day, or the next day, I think it was.

Re-direct Examination by Mr. Porter.

Q. As I understand you, you wrote down the conversation with Mr. Lord on the same day it occurred, or the next day, and sent the report of it to the company? A. That is exactly what I did.

Q. Your purpose was, was it, Mr. Bennett, to ascertain all the facts surrounding this matter, so as to see what legal position the United States Life Insurance Company should take with respect to its course?

Mr. Oppenheim: I object to the question as leading and improper.

The Master: I think it is objectionable in that form.

Mr. Oppenheim: The witness, as an attorney, ought to be able to state what his objects were.

Mr. Porter: Q. How long have you been practicing law here in this city, Mr. Bennett? A. Since the 29th day of September, 1870.

Q. Mr. Bennett, at the conversation which you had with Mr. George S. Lord, March 6, 1899, didn't Lord tell you, in the presence of Mr. Maine, that even if he had not seen Mr. Moore and Herman D. Cable's brother at the Union League Club just before he procured the delivery of the policy, and on the same day, he would nevertheless have paid the premium and got the Cable policy—taken the Cable policy on his own responsibility? A. He did.

JOSEPH H. STRONG, recalled as a witness on behalf of the complainant, in rebuttal, having been previously sworn, testified as follows:

Direct Examination by Mr. Porter.

Q. Mr. Strong, state whether or not you had a conversation with Mr. George S. Lord on March 7, 1899, at the Bankers' National Bank, respecting the matter of the Herman D. Cable policy? A. I did, by appointment.

Q. At that time, and during that conversation, didn't Mr. Lord tell you that on Sunday, February 26, 1899, the day before the de-

livery of the Cable policy to Lord, Mr. Herman D. Cable was in a very serious condition of health? A. He did.

Q. Didn't Mr. Lord tell you, at that same conversation, that on Monday morning, February 27th, as soon as he, Lord, had come into Chicago from Evanston, his place of residence, he called up Mr. Birnie Moore by telephone, and asked Mr. Moore to go to the vault in Herman D. Cable's business office, where his papers were kept, and ascertain if the policy for $50,000 that Herman D. Cable had applied for in the United States Life Insurance Company was among those papers, and ask Mr. Moore to notify him, Lord, of the fact immediately? A. He did, except I don't think he stated the office. I think he said, look in the vaults and the papers. I think the word office was not in the statement, as I remember it.

Q. Do you remember then he asked Mr. Moore to go to the vault where Mr. Herman D. Cable's papers were kept, but nothing was said about the office? A. As I remember, nothing was said about the office.

Q. In other respects— A. He stated Moore's relations to Cable, and stated that he asked him to make an inquiry to find that policy, and report to him.

Q. He said that he asked Moore this as soon as he got into Chicago from Evanston on the morning of February 29, 1899? A. On Monday; yes, sir.

Q. In that same interview which you had with Lord on March 7, 1899, didn't Lord tell you that after he had called up Mr. Moore, as stated in your last answer, he and Moore and one of Cable's brothers took luncheon at the Union League Club on the same day, February 27, 1899? A. Yes, sir.

Q. Didn't Lord also tell you at the same conversation, that at that luncheon it was agreed between him and Mr. Moore and one of Herman D. Cable's brothers that he, Lord, should obtain the Herman D. Cable policy from the United States Insurance Company and pay the premium thereon, if he could get it? A. It was during their conversation somewhere. I don't know when the conversation took place—he was recommended to get the policy.

Mr. Oppenheim: I move to strike out the answer of the witness.

Mr. Porter: Q. The answer must be either yes or no? A. Yes, with that provision, I don't know as it was at the lunch table. It was during that controversy.

Q. My question is this: Didn't Lord tell you, on March 7th, when you had the interview with him, that he and Moore and Cable's brother had agreed together at a luncheon at the Union League

Club, on February 27, 1899, that Lord should endeavor to get this policy, and to get it from the life insurance company if he could? A. I think the lunch table was not mentioned in this final round-up.

Q. Didn't Lord tell you on that occasion that Lord, Moore and Cable's brother had agreed together that Lord should get the policy? A. That is exactly so.

Q. On February 27, 1899? A. Exactly so; yes.

Q. At the Union League Club? A. That is my answer; yes.

Q. Then your only criticism of these questions was— A. On the table. He might not have been at the table. He might have been down in the office. I know very particularly that I noted down what he said.

Q. Mr. Strong, please state if you were ever authorized by the president, or the actuary of the United States Life Insurance Company, or by any of its officers, to waive any condition of the Herman D. Cable policy?

Mr. Oppenheim: That I object to, not rebuttal, and as to whether he had any authority or not, is a question of law, perhaps.

Mr. Porter: The policy provides that nobody but the president or actuary could waive any condition of the policy. Now, our case here is proving negatives all the way through. Mr. Strong appears as the general agent here. It appears that the president and actuary and the officers knew nothing of the illness. Mr. Strong was the general agent here. I merely want to show by him that he had no authority. It has been held by the United States Supreme Court that that is a proper thing to show in a case of this kind, that no authority was given him. The only way we can show no authority is to call a man, and say, did you ever receive any authority from your principal to do this, that and the other thing? In a case of this kind, for cancellation, where one of our allegations is that nobody had a right to do it, and nobody had the authority to waive any condition, even if it was waived, all we can do is to call witnesses and say we did not have the authority. There is no other way of getting at the fact.

Mr. Oppenheim: My objections still are that this is not rebuttal, and that as to whether or not he had authority was a question of law, not a question of fact. He could testify, if it was proper, whether or not any communication had ever been given him in regard to this matter, as to whether he had authority or not.

Mr. Porter: I will change the form of the question, if that is your objection to it.

Mr. Oppenheim: I still object, upon the ground that this is not in rebuttal. That would be a matter of discretion with the master.

The Master: I think I will allow him to answer it, if you will change it as you suggest.

Mr. Porter: Q. Mr. Strong, please state whether you ever received any communication from the president or the actuary of the United States Life Insurance Company, or from any other officer of that company, directing you or authorizing you in any way to waive any condition of the Herman D. Cable policy, in controversy here?

Mr. Oppenheim: That I object to, upon the ground it is im material.

The Master: He may answer.

(Exception for solicitor for defendant.)

A. I did not.

Mr. Porter: Q. Did you, as general agent in Chicago, ever authorize any person or persons, either Mr. McCabe or Mr. Finney, or anybody who has had anything to do with this policy, to waive any condition of this policy?

Mr. Oppenheim: That I object to upon the same ground as heretofore, that it would be a conclusion, but further than that the witness has already testified in this case as to what he did in regard to this policy, and went over the whole matter in his original examination.

The Master: I think he may answer.

A. I have not and did not, either of those gentlemen.

Cross-Examination by Mr. Oppenheim.

Q. What you mean, Mr. Strong, is that you did not know of Mr. Cable's illness until after his death? A. What I mean is that I did not know of his illness until his death—saw his notice posted.

Q. As to any authority to deliver this policy during Mr. Cable's illness, you mean that nothing was ever said about it? A. Nothing whatever.

Q. You had delivered this policy to Mr. Finney a couple of weeks before Mr. Cable's death, and perhaps ten days before he was taken ill?

Mr. Porter: Well, that has already been gone over, and the dates fixed.

The Master: There is no harm in his answering.

A. I would not be positive without looking up the record; I think I delivered it on the 21st of February.

Mr. Porter: Q. And that, from that time forward, you knew nothing at all about Mr. Cable's illness until his death was announced? A. Nothing until I saw it announced.

Q. And nothing was said about this policy one way or the other, in the meantime? A. I would not say that. I had some conversation in regard to the policy, which I have gone over in my testimony heretofore. We had a controversy between the agent and myself about the delivery, and I agreed to see Mr. Cable, as I testified, if necessary.

Q. Mr. Strong, at the time you had this conversation with Mr. Lord, where was it? A. It was in the east room of the Bankers' National Bank, about the middle of the room, near the window, on a sofa, I sat, I think, or a chair.

Q. You called Mr. Lord out of the directors' room, did you? A. No, sir; I was called in by President Lacey and assigned a seat, and Mr. Lord, as I remember, came to me.

Q. Came out? A. No; he did not come out. We went in and we went further in. The chairs were right up against the window, or a sofa as I sat on, I think.

Q. Was there anyone else present besides Mr. Lord? A. No one else. Mr. Lacy sat probably thirty feet away, or more, at his desk, with customers. In the cage there were men working, but we were sitting alone.

Q. You were in one of those small partitions? A. No, sir; we were in the open room.

Q. Was there anyone within hearing, that you know of? A. No one at all.

Q. Your object in going there was to tender Mr. Lord certain matters? A. That was one of my objects.

Q. Any other object? A. Yes, sir.

Q. To procure testimony? A. No, sir.

Q. What? A. To get at the facts in relation to the delivery. I may state that he said to me, either that day or the day before, he would be very glad to meet me at the bank.

Q. Was this after you had received a communication from Mr. Bennett? A. No, sir.

Q. As to the result of your interview? A. No, sir; I had not received at that date any communication from Mr. Bennett, as I remember. Mr. Bennett was to meet me there, and we failed to meet through some misunderstanding about the telephone. I asked Mr.

Bennett's office to meet me there, as I wanted him there, but he failed to get there. I wanted him present at the conversation.

Q. But you did not, at that time, have knowledge of the result of Mr. Bennett's interview with Mr. Lord? A. Well, I think Mr. Bennett and I had talked over the 'phone about the progress which he had made, but I did not know in detail anything until it was written and presented to me.

Q. Which was subsequent to the time of your conversation with Mr. Lord? A. Well, I think it was several days subsequent. Mr. Bennett then, as I remember, brought in a statement to me after the matters were all closed up.

It is hereby agreed by and between counsel that the suit of Alice A. Cable, administratrix, versus the United States Life Insurance Company, which was brought in the Superior Court of Cook County, Illinois, as alleged in the bill of complaint in this case, is still pending and has never yet been called for trial, and that it now stands No. 148 *upon the new calendar of Judge Chytraus, which the Judge began to call September* 15, 1900.

It is agreed between counsel that Doctor A. B. Clayton, who has heretofore testified in this case, died on or about Saturday, September 15, 1900.

Thereupon the complainant rested its case.

Adjourned.

3 o'clock P. M., Sept. 26, 1900.

Parties met, pursuant to adjournment.

Present: Mr. Porter, solicitor for complainant.
Mr. Oppenheim, solicitor for defendant.

JAMES R. OWEN, having been duly sworn as a witness in behalf of defendants, testified as follows:

Direct Examination by Mr. Oppenheim.

Q. Please state your name, Mr. Owen. A. James R. Owen.

Q. What is your business? A. Wholesale druggist.

Q. Are you a partner of George S. Lord? A. Yes, sir.

Q. What is the firm name? A. Lord, Owen & Co.

Q. Were you present at an interview had by a lawyer of the name of Bennett, and Mr. Lord, some time in the month of March, last year? A. Yes, sir.

Q. In regard to the Cable policy? A. Yes, sir.

Q. Was there anyone else present, that you recollect? A. Mr. Lord and these two gentlemen, Mr. Bennett and one other.

Q. How far were you from Mr. Lord and these gentlemen at the time this interview took place? A. Two or three feet.

Q. Did you hear what was said between them? A. Yes; I heard all the conversation.

Q. At that interview, you may state, Mr. Owen, whether or not Mr. Lord stated to Mr. Bennett that on the day on which he had received from Mr. Cable a policy on the life of Herman D. Cable, he, Lord, had taken lunch at the Union League Club with one of Mr. Cable's brothers and a Mr. Moore?

Mr. Porter: I object to the question, because the time of the interview has not been fixed, and it has not been identified as the same interview which Mr. Maine testified to, and besides, it is not competent testimony, being mere hearsay.

Q. Did you have any other interview, or hear any other interview with Mr. Lord in regard to this Cable policy in March, A. D. 1899, than the one you now speak of with those two gentlemen? A. No, sir.

The Master: I think he may answer.

Mr. Porter: Will the master permit me to ask one or two questions in advance?

The Master: Yes.

Mr. Porter: Q. What time in March did the conversation occur that you speak of? A. That I couldn't say; what time in March it was; but it was about the time of Mr. Lord's illness; that is all I know. I couldn't say whether it was in March or September; but it was about that time.

Q. Before Mr. Cable's death, or after? A. Well, I should say it was before Mr. Cable's death.

Q. Isn't it a fact that a number of people at different times came in there at that time along in the month of March, and had talks with Mr. Lord? A. I don't know of any others that came in, besides these two gentlemen.

Q. You don't know who those gentlemen were? A. I knew they were from the insurance company; that is all I know. I never was introduced to either one of them.

Q. How do you know they were from the insurance company? A. Because they talked over insurance matters. I was standing at the desk, and these two gentlemen—Mr. Lord was sitting at his desk, and my desk is opposite his, and I had stepped over there to speak to him and was standing at the edge of the desk, one about the size of that (indicating)—these two gentlemen came in, and they

stood right by the desk and I stood right here (indicating)—in regard to this table, if it was turned the other way—I was standing right behind one of the two gentlemen, and Mr. Lord was sitting at his desk, and these two gentlemen came in and were talking about a life insurance policy, about this Cable policy, and I know it was life insurancce business.

Q. Did you know what life insurance company it was? A. Why, I know; yes; I am satisfied in my own mind; I had tried to get a policy in the same company; I think it was the United States.

Q. Did you know at that time? A. Yes; I knew at that time, because I had made application for a policy in the same company.

Q. You listened to the conversation between them? A. Yes; I heard the conversation that was passing between those gentlemen.

Q. Had you seen either of those two men before? A. No, sir.

Q. Have you seen them since? A. No, sir.

Q. Were you present during the whole of the conversation? A. I couldn't say as to that. I was present during the conversation.

Q. You were there and heard something said between them? A. Yes, sir.

Q. You were not there, were you, during the whole of it? A. I couldn't say that I was there during the whole of it.

Mr. Porter: I still insist upon my objection to the master, not only upon the ground that the witness has not identified the particular conversation which was testified to by Mr. Bennett and Mr. Maine, but upon the ground that the testimony as to what the witness heard there is incompetent, immaterial and irrelevant.

The Master: I think it is competent. The interview seems to be sufficiently identified.

Mr. Porter: Save an exception.

Mr. Oppenheim: Will you state, Mr. Owen, whether at this interview you heard Mr. Lord say that at the date on which he received the Cable policy he, Lord, had taken lunch at the Union League Club with one of Mr. Cable's brothers and with Mr. Moore?

Objected to as before. Same ruling, and exception.

Mr. Porter: I wish to say, as an additional ground of objection to that question, that it is immaterial what the witness did or did not hear Mr. Lord say. The witness has already testified he was not there during the whole of the conversation.

The Master: Well, it goes to the strength and force of his testimony, but I think not to the competency of it.

Mr. Porter: Note an exception.

A. I did not.

Mr. Oppenheim: Q. Did you hear Mr. Lord say that, during the lunch down there at the Union League Club, he had discussed the matters with Mr. Cable's brother and with Mr. Moore of obtaining possession and delivering from the United States Life Insurance Company of the policy which had been written upon the life of Mr. Cable, and which had not yet been delivered?

Objected to as before. Same ruling, and exception.

A. I did not.

Q. Did Mr. Lord at the same conversation say that he had told Mr. Moore and Mr. Cable's brother that he thought he could get the policy and that they, Mr. Moore and Mr. Cable's brother, advised Mr. Lord to get it if he could?

(Objected to as before; same ruling and exception.)

A. He did not.

Q. At this same conversation did Mr. Lord say that he would have paid the premium upon the Cable policy and received it upon his own responsibility even if Cable's brother and Mr. Moore had not advised him to get it?

(Objected to as before; same ruling and exception.)

A. He did not.

Q. Do you remember how much of this conversation you heard between Mr. Bennett and Mr. Lord, whether you heard the whole of it or not, or have you a distinct recollection as to that? A. I couldn't say as to whether I heard the whole of it or not.

Q. Do you recollect as to whether or not these gentlemen left the room there before you went over to your own desk? A. I do not recollect.

Q. Your recollection is somewhat dim about that? A. Yes, sir; whether I left before they did, or whether they left before I did.

Q. As to whether or not you heard all the conversation you don't know? A. I don't know.

Cross-Examination by Mr. Porter.

Q. You don't remember what time in March this conversation took place? A. What day of the month, do you mean?

Q. Well, about the time? A. Do you mean what day of the month?

Q. Yes. A. I do not. It was in the morning, as far as that part of it goes; it was in the morning, between ten and eleven o'clock, I should say.

Q. When you state, in answer to these questions by Mr. Oppenheim, that Mr. Lord did not say the things which he has asked you, you mean that you did not hear him say them? A. That is what I heard.

Q. You wouldn't undertake to swear that he did not say them? A. I undertake to say that he did not say them at that time; yes, sir.

Q. While you were present? A. While I was present.

Q. You would not undertake to say that he did not say them during the conversation between those two men, would you? A. Yes, sir; I undertake to say that he did not say them during the conversation at that particular time, at that particular conversation.

Q. During the time that you have testified of—you were not there during the whole of the conversation? A. During my presence.

Q. You would not undertake to say that in that conversation that Mr. Lord had with those gentlemen after you left there, that Mr. Lord did or did not say anything? A. I can't say as to that.

Q. He might have said a great many things after you left their presence, might he not?

Mr. Oppenheim: That is objected to upon the ground that the witness has not testified that he did leave their presence and as to whether he might not have said a great many things is not a proper question.

A. Certainly he might have; yes, sir.

Mr. Porter: Did you make any notes or memoranda of that conversation? A. No, sir.

Q. Are you now able to remember everything that was said between Mr. Lord and these gentlemen? A. No, sir.

Q. While you were in their presence? A. No, sir; I don't pretend to.

Q. What part of it do you remember? A. These questions that have been asked me, I didn't hear in that conversation. That is all I could testify to.

Q. How is it that you are sure that you didn't hear those statements made by Mr. Lord about which Mr. Oppenheim has asked you? A. Say that again?

Q. How is it that you are sure that you didn't hear Mr. Lord make the statements about which Mr. Oppenheim has asked you when you say that you do not recollect all the conversation? A. I say I did not hear those questions—that conversation outlined by those questions.

Q. At that time did you know anything about the matter of the Cable policy? A. I knew that Mr. Lord, Mr. Cable and myself, all three, applied for insurance in this company.

Q. Before this conversation, didn't Mr. Lord and you discuss the matter of the Cable policy? A. I can't say as to that, because I do not recall just the day that this conversation took place, whether it was before Mr. Cable's death or after.

Q. At that time did you know, or were you acquainted with the circumstances under which the Cable policy had been delivered to Mr. Lord? A. If it had been delivered at that time, I knew the circumstances; yes, sir.

Q. When were you asked to testify in this case? A. Day before yesterday, I think it was—day before yesterday.

Q. With whom, if anybody, did you discuss the testimony which you were to give here before coming here? A. I was just told—Mr. Oppenheim told me those questions would be asked.

Q. Did you read over tne transcript of Mr. Maine's testimony and Mr. Bennett's? A. No, sir.

Q. Haven't you discussed the matter of your testimony with Mr. Lord? A. The testimony?

Q. Giving of testimony? A. Only once when I was in there day before yesterday, that is the only time.

Q. Did you read over the typewritten copy of Mr. Lord's testimony in this case? A. No, I haven't read it all. I saw it on his desk a couple of weeks ago, but didn't read it; just glanced at it; didn't read it over.

Q. Didn't Mr. Lord talk with you about it? A. No, sir.

Q. Did you hear Mr. Lord tell those two gentlemen at this conversation in March, that Herman D. Cable was seriously ill on Sunday, February 26? A. I couldn't say that I heard him say that; no, sir.

Q. Don't you recollect hearing Mr. Lord say something with reference to the serious condition of Mr. Cable on Sunday, February 26? A. No, sir.

Q. Did you hear anything else at that conversation, or did you hear anything at this conversation, that you remember? A. Why, I heard these gentlemen came in to see about that policy—about the policy that had been issued on Mr. Cable's life?

Q. I just asked you if you remember anything that was said during the conversation you have just testified to, in which you remember that certain things were not said.? A. Yes.

Q. Mr. Lord did not say certain things. Now, I ask you if you remember anything that he did say; anything that those gentlemen

said? A. I remember now—which of the two gentlemen it was I cannot say; whether it was Mr. Lord, or—

Q. I don't ask you now to state what they said; but I just ask if you remember? A. They simply came in and talked the matter over regarding this policy.

Q. I say, do you remember particularly any particular thing that was said by them to Mr. Lord, or by Mr. Lord to them? A. No; I don't remember anything that was said, particularly.

Re-direct Examination by Mr. Oppenheim.

Q. Mr. Owen, have you heard discussed by them prior or subsequent to the time of this interview, the manner in which this policy had been obtained by Mr. Lord, and by others? A. Yes, sir.

Q. When was the first time that you had ever heard that it was claimed that Mr. Lord had an interview with Mr. Cable's brother and Mr. Birney R. Moore, at the Union League Club upon the day upon which the policy was obtained, at which was discussed the obtaining of the policy?

Mr. Porter: That is objected to, as this witness is not competent to testify to anything except as to whether or not the conversation took place or the statements were made by Mr. Lord and Mr. Bennett, as has been testified to.

The Master: Objection sustained.

Mr. Oppenheim: Exception.

Mr Oppenheim: We close.

Mr. Porter: Well, we are all closed, then, on both sides.

Which was all the testimong offered by either of said parties, on the hearing of said cause before the master.

COMPLAINANT'S EXHIBIT 1.

(*See Stipulation, page* 14, *supra.*)

Complainant's Exhibit 2.

COMPLAINANT'S EXHIBIT 2.

CLAIMANT'S STATEMENT.

To be filled out by the party to whom the insurance is payable.

Notice is hereby given to the United States Life Insurance Company in the City of New York, that Herman D. Cable died on the 2d day of March, 1899; that deceased was the same person whose life was insured by said Company under policy No. 94082, dated February 6, 1899, for the sum of $50,000; that all premiums due prior to his decease had been duly paid upon said policy; that said deceased did not violate any of the conditions of said policy, either in respect to residence, occupation or otherwise; that the undersigned is the legal owner of said policy; and has a good and valid interest to the amount assured in the life of said deceased, and in proof of claim under said policy, doth make the following answers and statements:

1. When did deceased first complain of not being in usual good health? Feb. 24th.
2. When did deceased first consult a physician either for the original trouble or for some subsequent complication? Feb. 24th.
3. State length of time deceased was confined to the house or unable to attend to business? Five and one-half days.
4. State length of time deceased was confined to bed. Five and one-half days.
5. State name and residence of every physician who has attended or prescribed for the deceased since the insurance began. A. B. Clayton, W. A. Phillips, E. H. Webster, Evanston; Arthur Edwards, Chicago.
6. Last residence—Town of Evanston, in the County of Cook, in the State of Illinois.
7. Had residence been elsewhere since the date of policy? No.

If so, where and when?

8. What profession or occupation had the deceased followed since date of policy? State each. Manf. of Pianos & Organs.
9. Place of birth (state, town and district or county). Walton, Delaware Co., New York.
10. Date of birth—Year, 1849. Month, June. Day, 1st.
11. From whence is date of birth derived? From family record, certificate of birth, or otherwise? Mother.

Complainant's Exhibit 2.

12. Was the deceased married or single? Married.

13. Had the deceased any other life insurance? If so, state in what companies, for what amounts, and the dates of the policies respectively. New York Life, $25,000, dated about 10 yrs. ago; Providence Savings Life Assurance, $50,000, Dec. 1/99; Fidelity of Phila., $10,000—1892; New England Mutual, $2,000—1872.

14. How long have you known deceased? 19 years.

What was your relationship to deceased? Wife.

15. Is the assurance claimed under assignment? No.

16. If so, state by whom assigned, and produce assignment.

17. Was an inquest or *post-mortem* examination held on the body? No.

18. If inquest was held, furnish certified copy of verdict and evidence.

19. Give full name and residence of claimant. Alice A. Cable, Admx., 1742 Asbury Ave., Evanston, Ill.

20. State the date of birth of claimant. Year, 1862. Month, Apr. Day, 25.

ALICE A. CABLE,
Admx.

OATH.

State of Illinois, }
County of Cook. } ss.

On this fourteenth day of April, 1899, personally appeared before me the above named Alice A. Cable, Admx., and having subscribed the foregoing statement before me, thereupon made oath that the statements and answers by her made therein are true, to the best of her knowledge and belief, and that she has concealed no material fact from the company.

H. N. TYSON,
Notary Public.

(Seal.)

CERTIFICATE OF THE ATTENDING PHYSICIAN.

The undersigned was the attending physician in the last sickness of Mr. Herman D. Cable, of Evanston, in the State of Illinois, who died at Evanston, in the State of Illinois, on the second day of March, 1899.

And for further information of the company, the undersigned doth make the following answers and statements:

Complainant's Exhibit 2.

1. (*a*) Give your full name. (*a*) Edward H. Webster.
(*b*) Residence and P. O. address. (*b*) 1332 Chicago Ave., Evanston, Ill.
2. How long have you known deceased? 7 years.
3. How long had you been the medical attendant or adviser of the deceased? 7 years.
4. Had deceased any other medical attendant, to your knowledge? If so, give name and address. Dr. A. B. Clayton, Dr. W. A. Phillips, of Evanston; Dr. Arthur Edwards, Chicago.
5. When did last illness commence? Feby. 24, 1899.
6. (*a*) Date of your first visit. Feby. 25th, 1899.
(*b*) Date of your last visit. March 2d, 1899.
7. State the immediate cause of death. Pneumonia.
8. (*a*) Was the deceased afflicted with any other disease? (*a*) No.
(*b*) If so afflicted, state with what disease, and for what period of time. (*b*)
(*c*) Did it hasten death? (*c*)
9. For how long a time was deceased confined to the house or prevented from attending to business? From Feby. 24th to March 2d.
10. When were you first consulted by the deceased, or by any member of the family, for the affection which either directly or indirectly caused death? Feb. 25th, 1899.
11. What were the general symptoms present, then and afterwards, during the progress of the disease? The ordinary symptoms incident to the disease.
12. Was there any special cause (remote or proximate) for the death in the habits, occupation, residence, or personal history of the deceased? No.
If so, state which and give particulars.
13. Was death caused proximately or remotely by intoxicating drinks, or opium, or by the hand of justice, suicide or dueling? No.
14. Was an inquest or autopsy held on the body of deceased? If so, state results; and, in case of an autopsy, who performed it. No.
15. What was the real or *apparent* age of deceased? 49 years.
16. Prior to the last illness, for what diseases did you treat or advise deceased? Slight ailments.
17. Have you stated all the material facts relating to the last illness of the deceased? I have.

EDWARD H. WEBSTER,
Attending Physician.

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Complainant's Exhibit 2.

OATH.

State of Illinois, } ss.
County of Cook. }

On this fourteenth day of April, 1899, personally appeared before me, the above named Edward H. Webster, and having subscribed the foregoing certificate before me, thereupon made oath that the statements and answers by him made therein are true, to the best of his knowledge and belief, and that he has concealed no material fact from the company.

(Seal.)

H. N. TYSON,
Notary Public.

STATEMENT OF THE MINISTER OR OTHER PARTY WHO OFFICIATED AT THE INTERMENT OF DECEASED.

State of Illinois, } ss.
County of Cook. }

J. F. Lobn, of Evanston, Ill., being duly sworn, deposes and says, that he is the pastor of the First Congregational Church, at Evanston, and that he was personally acquainted with Herman D. Cable, of Evanston, Ill., in his lifetime, now deceased, and he knows, of his own knowledge, that said Herman D. Cable was interred in the burial ground of Graceland, on the fifth day of March, A. D. 1899, and that he officiated at such interment.

J. F. LOBN.

Subscribed and sworn to before me, this fourteenth day of April, A. D. 1899.

(Seal.)

H. N. TYSON,
Notary Public.

STATEMENT OF THE UNDERTAKER.

1. Name of deceased. Herman D. Cable.
2. Was the party white or black? White.
3. Residence. Evanston, Ill.
4. Occupation. Piano manufacturer.
5. Did you inter the body of said deceased, and do you know

Complainant's Exhibit 2.

that it was the body of the person above named beyond a doubt? Yes.

6. Date of birth. June 1st. Year, 1849. Month Day

7. Age at death. Give real or apparent age, or both. 49 years.

8. Place and date of interment. Graceland Cemetery, March 5th, 1899.

9. What was deceased's height? 5 ft. 10 inches. Weight? 175 lbs. Color of hair? Gray. Color of eyes? Dark Brown. Complexion? Dark. What particular marks, scars, or mutilations on face or body? None.

10. What is your residence? Evanston. And place of business? 1610 Maple Ave.

JOHN L. HEBBLETHWAITE.

OATH.

State of Illinois, } ss.
County of Cook. }

On this fourteenth day of April, 1899, personally appeared before me, the above named John L. Hebblethwaite, and having subscribed the foregoing statement before me, thereupon made oath that the statements and answers by him made therein are true, to the best of his knowledge and belief, and that he has concealed no material fact from the company.

H. N. TYSON,
Notary Public.

(Seal.)

State of Illinois, } ss.
Cook County. }

I, Philip Knopf, county clerk and clerk of the county court of Cook County, the same being a court of record, do hereby certify that H. N. Tyson, whose name is subscribed to the annexed jurat, was, at the time of signing the same, a notary public in Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths; that I am well acquainted with the handwriting of said Notary, and verily believe that the signature to the said jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the City of Chicago, in the said county, this 17 day of April, 1899.

PHILIP KNOPF,
Clerk.

(Seal.)
(10c revenue stamp.)

Complainant's Exhibit 2.

AGENT'S STATEMENT.

State of Illinois, } ss.
County of Cook. }

I, J. H. Strong, being duly sworn, depose and say that the last premium on policy No. 94082, due Feby. 6, 1899, was paid to me on the 27th day of Feby., 1899, and that I have carefully read all the foregoing statements, and I know of nothing affecting the claim that has not been expressly stated therein, excepting none.

J. H. STRONG,
Agent.

Subscribed and sworn to before me this 17th day of April, A. D. 1899.

LILLIAN VERRALL,
Notary Public.

(Seal.)
(Form 196.)

PROOFS OF CLAIM
Submitted to the
UNITED STATES LIFE INS. CO.
In the City of New York.
For Examination and Approval.

Claim No.....

Policy No. 94082. $50,000
Life of Herman D. Cable.
Residence, Evanston, Ill.
In favor of self.
Date of Birth, June 1/49. Death, Mch 2/99.
Occupation, Manf. Pianos & Organs.
Cause of death.
First notice, Mch. 25/99.
Blanks forwarded, Mch. 25/99.
Proofs received Apl. 19/99.
Action of committee .....Date.....
Claim due when proofs are accepted.
Date of policy, Feby. 9/99. Kind, 10 yr. term. 30 insts.
Date of last payment, Mch. 3/99. Age, 50.
Amount of Policy .....$.....
Additions..... .....

Total.....$.....

Complainant's Exhibit 2.

Deduct,
Loans .....$.....
Interest .....$.....
Deferred premium .....$..... $.....
Amount due ..... $.....
Discount .....day ..... $.....
Net amount paid ..... $.....
When paid .....
Draft to order of .....
Examined by
.... President.
..... Medical Examiner.
..... Actuary.
Approved .....189 ..
.....
.....
.....
Committee on Losses.

AGENTS, ATTENTION!

Before forwarding proofs, see that all blanks are filled and every question answered, and that the instructions are strictly carried out, thus avoiding delay and facilitating prompt action on the claim.

GENERAL INSTRUCTIONS.

Each of the within certificates must be sworn to, and the certificate of county clerk, under his official seal, must in all cases be obtained, that the person administering the oath was at the time duly authorized for that purpose, and that his signature is genuine.

When the beneficiary under a policy is dead (as in the case of a policy in favor of the person whose life is assured), a certificate will be required from the proper court to show who is authorized to act as administrator or executor of such deceased beneficiary.

When a policy has been assigned, the original assignment, or a properly authenticated copy thereof, must be presented with proofs of death.

When a policy, payable by its terms to one beneficiary, if surviving, has, by the death of such beneficiary, become payable to another, proof of the death of such first beneficiary must be furnished by affidavit of respectable persons, well acquainted with such deceased beneficiary.

Complainant's Exhibit 3.

When a policy is payable to the children in general of a person, or to any other class of persons whose names are not separately mentioned in the policy, proof must be furnished of how many children there are, or of how many the class consists, and the name, residence, age. of each of the persons given, and, if married, to whom. If any are minors, proof of the appointment of the guardian by deed or will by the deceased, who as such, without discharge, would be the proper claimant, or if there is no testamentary or like guardian, then proof of appointment of guardian by court must be furnished. In case of appointment of guardian by deed or will, a certified copy of such instrument must be furnished.

And in general, when the policy or the death is peculiar in any respect, the forms of proof and claim must be adapted to the peculiar circumstances of the case.

If an inquest was held or post-mortem examination made, a duly certified copy must be furnished.

As the intervention of any third person is not necessary for the collection of the claim, payment of commission or any money to any person for pretended services in regard to the collection of uncontested claims upon the company is entirely unnecessary and wasteful.

COMPLAINANT'S EXHIBIT 3.

Chicago, Ill., Mar. 2

James F. McCabe, Hollanden Hotel, Cleveland, Ohio:

Cable died this morning. Was sick when policy delivered. Company want policy back. Am non-committal pending hearing from you. Have you any advise.

THOMAS J. FINNEY.

FOLDOUT(S) IS/ARE TOO LARGE TO

147 And on to-wit: the 23rd day of October, in the July term of said Court, 1900, in the records of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry, to-wit:

ORDER OF OCTOBER 23, 1900.

Hearing 1900.

United States Life Insurance Company
vs.
Alice M. Cable, Admx. } 25163.

Now come the parties by their solicitors. On motion, it is ordered by the Court that the objections heretofore filed herein to the Master's report stand as exception to said report. And now this cause comes on to be heard on pleadings and proofs filed herein and on exceptions to the Master's report. The Court after hearing the arguments of counsel takes the matter under advisement.

148 And on to-wit: the 21st day of December, in the December term of said Court, 1900, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry, to-wit:

DECREE OE DECEMBER 21, 1900.

Decree, 1900.

United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, Administratrix of the Estate of Herman D. Cable, deceased. } 25,163.

This cause having come on to be heard on the pleadings, upon the proofs and exhibits herein and the report of William M. Booth, Mastery in Chancery of this Court, made in pursuance of an order of reference heretofore entered herein, and upon the defendant's exceptions to said report and the cause having been argued by counsel for the respective parties, and the Court being fully advised in the premises, doth sustain the first exception filed by the defendant to the Master's report, and disproves of that portion found in finding VIII, as follows:

21. "That on the 27th day of February, 1899, the said Herman D. Cable was seriously ill with acute pneumonia, and was not in good health, and was not in insurable condition, and that this was well known to the said George S. Lord when he procured the delivery to himself of the Cable policy and paid the premium thereon, but that he did not communicate such knowledge to the said McCabe, any further than by making the statement to him which has been set forth heretofore in finding VI, and that the Master finds that the said Lord's statement that Cable had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, while it was substantially true at the time when it was made, was deceptive in its nature and not calculated or intended to inform
149 McCabe as to the serious condition of Cable's health, or lead him to suspect it," and makes the following finding of fact in lieu thereof.

"That on the 27th day of February, 1899, the said Herman D. Cable was seriously ill with acute pneumonia and was not in good health and was not in insurable condition; and that said George S. Lord when the Cable policy was delivered to him and the premium paid thereon was aware of such fact; that when said Lord was asked by McCabe, as the agent of the complainant, as to the then condition of Herman D. Cable, he in good faith and without any intent to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, as heretofore found in finding VI, but that said Lord did not make any further statement in regard to the condition of said Cable, nor were any further inquiries made by McCabe in regard thereto," and the Court doth overrule the second and third exceptions taken by the defendant to the said master's report, to the overruling of each of said exceptions, the defendant excepts.

And it is ordered and adjudged by the Court that the said Master's report as modified by the Court be, and the same is hereby approved and confirmed.

It is therefore found and determined by the Court that the facts as set out in the findings of the Master's report as hereinbefore modified and changed by the Court are true, and as a conclusion of law thereon, that the delivery of the policy of life insurance set forth in the pleadings and in controversy herein (being Policy number 94,082, written by the complainant upon the life of Herman D. Cable, deceased, and dated February 6, 1899), was procured on behalf of the said deceased by constructive fraud and that no actual fraud was intended or practiced in the delivery of the
150 same and that the complainant is entitled to the relief prayed for.

It is therefore ordered, adjudged and decreed that said policy of life insurance be, and it is hereby annulled and cancelled and declared to be of no force and effect as an obligation of the complainant; that said policy be forthwith surrendered and delivered to the complainant or to its solicitors; that upon such surrender and delivery of said policy, the complainant forthwith pay to the defendant, or to one of her solicitors of record herein, the sum of eight hundred forty eight dollars and fifty cents heretofore received by the complainant on account of the said policy, and that the costs of this suit be taxed against the defendant. Decree 1900.

The Court reserves power and jurisdiction in this cause to make any such further orders as it may think necessary or expedient to secure the full and effectual execution of this decree, including power and jurisdiction to prevent the defendant, her agents, solicitors and attorneys from prosecuting any suits or actions against the complainant upon said policy of insurance and the defendant objects and excepts to the entry of this decree by the Court.

151 And on to-wit: the 31st day of December, 1900, came the defendant in said entitled cause by her solicitors and filed in the clerk's office of said Court her Petition for Appeal, in words and figures following to-wit:

PETITION FOR APPEAL.

Petition for Appeal, 31 Dec 1900

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois.

Northern Division.

United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased.

The above named defendant deeming herself aggrieved by the decree made and entered in the above entitled cause, on the 21st day of December, 1900, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Seventh Cir-

cuit, for the reasons specified in the Assignment of Errors filed herewith and she prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

H. H. C. MILLER,
F. S. SHAW and
W. S. OPPENHEIM,
Sol'rs. for Defendant.

Dated December 31, 1900.
The foregoing claim of appeal is allowed.

KOHLSAAT,
District Judge.

Dated Chicago, December 31, 1900.
(Endorsed) Filed Dec. 31, 1900.

S. W. BURNHAM,
Clerk.

152 And on the same day to-wit: the 31st day of December, 1900, came the defendant in said entitled cause by her solicitors and filed in the clerk's office of said court her assignment of errors in words and figures following to-wit:

ASSIGNMENT OF ERRORS.

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Northern Division.

United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased.

And now comes the defendant, Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, (appellant) who has prayed an appeal from the final decree entered herein on the 21st day of December, A. D. 1900, and shows that there is manifest

error in the record of the foregoing proceedings and assigns the following errors upon the record in this cause:

1. The Circuit Court erred in entering a decree ordering the cancellation of the policy of insurance issued to the insured.

2. The Circuit Court erred in refusing to sustain the second exception made by appellant to the Master's Report and affirmatively find that at the time that George S. Lord received the policy, it was his belief that the insured was not then dangerously sick, but would shortly recover from his then illness.

3. The Circuit Court erred in refusing to sustain the third exception made by appellant to the Master's report and affirmatively find that the information conveyed by George S. Lord to the appellee's agent was sufficient notice of the illness of Herman
153 D. Cable at the time of the delivery of the policy and payment of the premium.

4. The Circuit Court erred in adjudging and holding that the appellee had not sufficient notice of the illness of Herman D. Cable at the time of the delivery of the policy.

5. The Circuit Court erred in holding that the appellee did not waive the provision of the policy as to its delivery during the sound health and insurable condition of the insured.

6. The Circuit Court erred in holding and adjudging that the information given it at the time of the delivery of the policy that the insured had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, without giving further details as to the nature and character of such illness, was a constructive fraud which vitiated the policy, notwithstanding that no further inquiry was made by the appellee as to the nature or character of such illness.

7. The Circuit Court erred in not dismissing the amended and supplemental bill of complaint and remitting appellee to making its defense in the action at law brought by appellant against appellee in the State Court.

8. The Circuit Court erred in refusing to hold and adjudging that the delivery of the policy by McCabe to Lord after he was informed by Lord that Cable was sick, was a waiver of the provision in the application that the policy was only to take effect on its delivery during the sound health and insurable condition of Herman D. Cable.

9 The Circuit Court erred in holding and adjudging that the policy was obtained by constructive fraud in failing to disclose
154 to appellee the dangerous illness of the insured.

10. The Circuit Court erred in entering a decree directing the cancellation of the policy of insurance for the reason that at the time of the delivery of the poiicy and payment of the premium, the ap-

pellee was informed only as to the illness of the insured and not as to the exact nature of such illness.

11. The Circuit Court erred in not entering a decree in favor of the appellant and against the appellee, directing the payment of the sum of $30,000.00 as provided by the policy of insurance.

Wherefore the said Alice A. Cable, Administratrix of the Estate of Herman D. Cable, deceased (appellant), prays that the order and decree of said Circuit Court of the United States in and for the Northern District of Illinois, be reversed, set aside and held for naught and for such further order and decree as to this court may seem just and equitable in the premises.

ALICE A. CABLE,
Administratrix of the estate of Herman D. Cable, Deceased.
By W. S. OPPENHEIM,
Her Solicitor.

(Endorsed) Filed Dec. 31, 1900.

S. W. BURNHAM,
Clerk.

156 And on the same day to-wit: the 31st day of December, 1900, there was filed in the clerk's office of said court a certain Bond on Appeal in words and figures following to-wit:

BOND ON APPEAL.

IN THE CIRCUIT COURT OF THE UNITED STATES.

Northern District of Illinois.

Northern Division.

United States Life Insurance Company in the City of New York,
vs
Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased.

Know all men by these presents that we, Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, as principal, and H. H. C. Miller and F. S. Shaw, as sureties, are held

and firmly bound unto the United States Life Insurance Company in the city of New York, in the full and just sum of five hundred dollars ($500) to be paid to the said United States Life Insurance Company of the City of New York, its certain attorneys, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 27th day of December, A. A. 1900.

Whereas lately at the December Term of the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division, in a suit depending in said Court between the United States Life Insurance Company in the City of New York, complainant, and Alice A. Cable, administratrix of the estate of Herman D. Cable, defendant, a decree was rendered against Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, on the 21st day of December, A. D. 1900. and the said Alice A. 157 Cable, administratrix of the estate of Herman D. Cable, deceased, having obtained an appeal to reverse the decree of the aforesaid suit and a citation directed to the said United States Life Insurance Company of the City of New York citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, Illinois, thirty days from the date hereof,

Now the Condition and the Obligation is such that if the said Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, shall prosecute her appeal to effect and answer all damages and costs, if she fails to make her plea good then the above obligation to be void, else to remain in full force and effect.

ALICE A. CABLE, Administratrix,
By F. S. SHAW,
Atty. in Fact. (Seal)
H. H. C. MILLER. (Seal)
FRANK S. SHAW. (Seal)

Sealed and Delivered in the Presence of
W. S. OPPENHEIM.

Approved December 31st, 1900.
KOHLSAAT,
District Judge.

O. K.
ISHAM, LINCOLN & BEALE.

(Endorsed) Filed Dec. 31, 1900.
S. W. BURNHAM,
Clerk.

155 And on the same day to-wit: the 31st day of December, in the December term of said court, 1900, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

ORDER OF DECEMBER 31, 1900,

Allowing Appeal.

United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased. } 25163.

Now comes the defendant, by her solicitors and presents to the Court her petition for appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the decree entered herein on the 21st day of December, A. D. 1900, and also files her assignment of errors.

It is thereupon ordered by the Court, that said appeal be allowed upon the filing by the defendant of a sufficient bond with surety to be approved by the Court in the penal sum of five hundred (500) dollars.

158 And on to-wit: the ninth day of January, 1901, in the December term of said court, 1900, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

ORDER OF JANUARY 9, 1901.

Order 9, 19 exc

The United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, administratrix of the estate of Herman D. Cable (deceased.) } 25,163.

It appearing to the court that at the entry of the final decree herein on the 21st day of December, 1900, the solicitors for the complainant objected and excepted to that part of said decree wherein the court sustained the first exception filed by the defendant to the Master's report and disapproved of that portion of Finding VIII of said report set forth in the decree; and to that part wherein the court found "that when said Lord was asked by McCabe as the agent of the complainant as to the then condition of said Herman D. Cable, he in good faith and without any intent to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, as heretofore found in Finding VI;" and to that part wherein the court modified the Master's report and approved and confirmed it only subject to such modification; and to that part wherein the court modified the findings of the Master's report, and found and determined that the facts as therein set forth were true, subject to such modification and change; and to that part wherein the court found and determined that no actual fraud was intended or practiced in the delivery of the policy mentioned in the decree; but it further appearing that such objections and exceptions are not shown of record, It is now on application of the complainant's solicitors,

Ordered that exceptions as above set forth on behalf of the complainant be and the same hereby are noted of record as taken and duly allowed by the court *nunc pro tunc* as of December 21, 1900.

159 And on to-wit: the 9th day of January, 1901, there was filed in the Clerk's office of said court a certain stipulation, in words and figures following to-wit:

STIPULATION.

UNITED STATES CIRCUIT COURT

Northern District of Illinois,

Northern Division.

United States Life Insurance Company, in the City of New York,
vs.
Alice A. Cable, Administratrix of Herman D. Cable, deceased.
} 25,163.

It is hereby stipulated and agreed by and between the solicitors for the complainant and defendant, that in making up the record for the United States Circuit Court of Appeals, in the above entitled cause, the clerk may use printed copies of the pleadings, testimony, master's report and objections thereto, without prejudice to the right of either party to have any errors in the same corrected.

ISHAM, LINCOLN & BEALE,
Complainant's Solicitors.

H. H. C. MILLER,
F. S. SHAW and
W. S. OPPENHEIM,
Defendant's Solicitors.

(Endorsed) Filed Jan. 9, 1901.

S. W. BURNHAM,
Clerk.

Northern District of Illinois, } ss.
Northern Division. }

I, S. W. Burnham, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record in said Court in the cause entitled United States Life Insurance Company, in the City of New York vs. Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased, as the same appear from the original records and files of said court, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, in said District, this 11th day of January, 1901.

S. W. BURNHAM,
Clerk.

(Seal)

United States } ss.
of America. }

The President of the United States, to United States Life Insurance Company in the City of New York, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a Petition for Appeal filed in the Clerk's Office of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, wherein Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, this 31st day of December, in the year of our Lord one thousand nineteen hundred.

KOHLSAAT,
District Judge.

Service accepted this 2nd day of January, 1901.
UNITED STATES LIFE INS. CO.
By ISHAM, LINCOLN & BEALE,
Its Solrs.

(Indorsed) Filed Jan. 2, 1901.
S. W. BURNHAM,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Courf of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages numbered from 1 to 157 inclusive, contain a true copy of the printed record filed in this court on the eighth day of February, 1901, which was prepared for the printer, indexed, supervised and distributed by me in accordance with the rules of this court and upon which the cause was determined by the United States Circuit Court of Appeals for the Seventh Circuit in the case of Alice A. Cable, Administratrix of the Estate of Herman D. Cable, Deceased, *vs.* United States Life Insurance Company in the City of New York, No. 762, October Term, 1901, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighteenth day of December, A. D. 1901.

EDWARD M. HOLLOWAY,

[SEAL] *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms in the city of Chicago in said seventh circuit on the second day of October, 1900, of the October term in the year of our Lord one thousand nine hundred and of our Independence the one hundred and twenty-fifth year.

And afterwards, to wit: on the twelfth day of January, 1901, in the October term last aforesaid, came the appellee, by its counsel, Mr. Gilbert E. Porter, Mr. William G. Beale and Mr. Edward S. Isham, and filed in the office of the clerk of this court their appearance, said appearance being in the words and figures following, to wit:

Appearance for Appellee. *Filed Jan.* 12, 1901.

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1900.

ALICE A. CABLE, Adm'x of the Estate of Herman D. Cable, Deceased, Appellant,
vs.
UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF New York, Appellee. } 762.

The clerk will enter *my* appearance as counsel for the appellee.

GILBERT E. PORTER.
WM. G. BEALE.
EDWARD S. ISHAM.

Endorsed: Filed Jan. 12, 1901. Edward M. Holloway, clerk.

And afterwards, to wit: on the fifteenth day of January, 1901, in the October term last aforesaid, came the appellant by her counsel, Mr. H. H. C. Miller, Mr. F. S. Shaw and Mr. W. S. Oppenheim, and filed in the office of the clerk of this court their appearance, said appearance being in the words and figures following, to wit:

Appearance for Appellant. *Filed Jan.* 15, 1901.

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1900.

ALICE A. CABLE, Adm'x of the Estate of Herman D. Cable, Deceased,
vs.
UNITED STATES LIFE INSURANCE COMPANY IN THE CITY of New York. } No. 762.

The clerk will enter *my* appearance as counsel for the appellant.

H. H. C. MILLER,
F. S. SHAW, AND
W. S. OPPENHEIM.

Endorsed: Filed Jan. 15, 1901. Edward M. Holloway, clerk.

And afterwards, to wit: on the ninth day of April, 1901, in the October term last aforesaid, the following proceedings were had and entered of record, to wit:

Order of April 9, 1901, Setting Cause for Hearing.

TUESDAY, *April* 9, 1901.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Peter S. Grosscup, circuit judge.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased,
vs.
UNITED STATES LIFE INSURANCE COMPANY, ETC. } 762.

Appeal from the circuit court of the United States for the northern district of Illinois, northern division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing April 11, 1901.

And afterwards, to wit: on the eleventh day of April, 1901, in the October term last aforesaid, the following proceedings were had and entered of record, to wit:

Hearing, April 11, 1901.

THURSDAY, *April* 11, 1901.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Peter S. Grosscup, circuit judge.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased,
vs.
UNITED STATES LIFE INSURANCE COMPANY, ETC. } 762.

Appeal from the circuit court of the United States for the northern district of Illinois, northern division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and an oral argument by Mr. W. S. Oppenheim, counsel for appellant, and by Mr. William G. Beal, counsel for appellee, and the court having heard the same, takes this matter under advisement.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-room, in the city of Chicago, in said seventh circuit, on the first day of October, 1901, of the October term in the year of our Lord one thousand nine hundred and one, and of our Independence the one hundred and twenty-sixth year.

And afterwards, to wit: on the first day of October, 1901, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Order of Oct. 1, 1901, Assignment of Judge Seaman.

TUESDAY, *October* 1, 1901.

Present: Hon. James G. Jenkins, circuit judge, presiding; Hon. Peter S. Grosscup, circuit judge; Hon. William H. Seaman, district judge.

Order.

It is ordered by the court that William H. Seaman, judge of the district court of the United States for the eastern district of Wisconsin, be designated and assigned to sit in this court as a member thereof during the present session.

Thereupon said Seaman appeared and took his seat as a member of said court.

And afterwards, on the same day, to wit: on the first day of October, 1901, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Decree and Opinion, Oct. 1, 1901.

TUESDAY, *October* 1, 1901.

Present: Hon. James G. Jenkins, circuit judge, presiding; Hon. Peter S. Grosscup, circuit judge; Hon. William H. Seaman, district judge.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased,
vs.
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY of New York. } 762.

Appeal from the circuit court of the United States for the northern district of Illinois, northern division.

Now again this cause comes on to be considered on the opinion of the judges before whom it was heard, which opinion is as follows:

Decree and Opinion, Oct. 1, 1901.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1900, May Session, 1901.

ALICE A. CABLE, as Administratrix of the Estate of Herman D. Cable, Deceased, Appellant,
vs.
THE UNITED STATES LIFE INSURANCE COMPANY IN THE City of New York. } No. 762.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE City of New York, Appellant,
vs.
ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased. } No. 775.

Appeal and cross-appeal from the circuit court of the United States for the northern district of Illinois.

Before Woods, Jenkins, and Grosscup, circuit judges.

The United States Life Insurance Company in the City of New York filed its bill in equity against Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, for the cancellation upon the ground of fraud of a policy written by the company upon the life of the defendant's intestate. A demurrer to the bill was sustained and upon appeal to this court the judgment of the court below was reversed and the demurrer directed to be overruled. *United States Life Insurance Company in the City of New York v. Cable*, 39 C. C. A., 264; 98 Fed. R., 761; to which reference is made for a statement of the allegations of the bill. Upon the filing of the mandate in the court below an answer was filed to the bill admitting the fact of the application and of the policy as stated in the bill, but denying the fraud, and containing the following admissions and allegations:

"Defendant further answering admits that said policy on the life of said Herman D. Cable was, after its execution, sent to the city of Chicago, but to which particular agent of the complainant in said city this defendant is not advised, except as she is informed by the bill of complaint filed herein, and defendant further admits that on or about the 21st day of February, 1899, said policy was tendered by the said James F. McCabe, as agent of the complainant, to said Herman D. Cable, and that at this particular time said Cable declined to take up the matter of said policy with said McCabe and pay the premiums thereon, for the reason that he was then too busy to examine the policy and see whether it was the same in its terms and conditions as represented when his application was taken, and for the further reason that he desired to confer with his close and intimate friend, Mr. George S. Lord, who had made an application

for insurance through the same agent in the same company, and to whom a policy had also been issued, but had not yet been delivered.

"Defendant further answering says that said Lord and said Cable were connected together by the closest ties of friendship, and were also interested together in various business enterprises, and were in almost daily communication with each other, and had been such friends and so interested in various business enterprises for many years prior to February 1899, and that each was in the habit of acting for the other in matters in which they were mutually interested.

"Defendant further answering admits that upon the evening of the 24th day of February, 1899, said Cable became ill, and that upon the following day his illness was diagnosed as a slight attack of pneumonia, but denies that upon the 26th day of February the life of said Cable was despaired of by his physicians and family, or that any such report was in circulation, but says, on the contrary, that on the 26th and on the 27th days of February, 1899, his illness was not considered as at all dangerous, but a speedy recovery of said Cable was confidently expected by his said family, and said Lord, and that no danger of death from said illness was at all apprehended by them, or either of them.

"Defendant further answering admits that the said Lord was in daily communication with said Cable and his family during said illness, as had been his custom for many years prior thereto, but denies that he was informed that said Cable was in serious physical condition and that his death was expected from the disease which he then had, but says that on the contrary said Lord believed and was informed by the family of said Cable that he was not considered to be in a dangerous condition.

"Defendant further answering admits that on the 27th day of February, 1899, said McCabe went to the office of said Lord for the purpose of ascertaining whether said Lord and said Cable would take said policies, and that he was then informed by said Lord that he, said Lord, was willing to take both of the policies, but that said Cable was then ill at his home in Evanston, and if said McCabe, with knowledge of this fact, desired to deliver said policies he would receive and pay for the same; that said McCabe then went from said office, and shortly after returned with the policy issued in favor of said Cable, and delivered the same to said Lord, well knowing and being informed of the true condition of said Cable, and that with such knowledge he received from said Lord the premiums upon both of said policies for the first year of the life of the same; that is, from the 6th day of February, 1899, until the 6th day of February, 1900.

"Defendant further expressly denies that the illness of said Cable was not made known to the complainant, but was purposely and wilfully concealed from it, but on the other hand, defendant alleges that the true condition of said Cable was fully told and made known to the complainant prior to the delivery of said policy and the payment of the premium thereon.

"Defendant further denies that said Lord was not authorized by said Cable to accept said policy and pay the premiums thereon,

but on the contrary alleges that he was requested by the said Cable to so receive said policy and pay the first premium thereon when he, the said Lord, should take his policy.

"Defendant further answering admits that the said Cable did on Thursday, March the 2nd, 1899, depart this life, but denies that such death was occasioned by pneumonia, but was occasioned by heart failure, the result of sudden complications which arose a few hours before his said death, and which were not expected, or apprehended by his family or physicians, until a short time before they occurred."

On March 21, 1900, an order was entered that the cause be referred to a master "to take the evidence in said cause and report the same to this court." The master on October 5, 1900, filed his report, returning the evidence adduced before him, and reported fifteen findings of fact, reference being here made to the following:

I.

"That the complainant is a corporation, duly organized under the laws of the State of New York, and a citizen of the State of New York, and has been for many years last past, and is now, engaged in the business of insuring lives throughout the United States, and has been for many years, and is now, lawfully engaged in carrying on said business in the State of Illinois, under proper license; and that the defendant, Alice A. Cable, is a citizen of the State of Illinois, residing in the northern district thereof. The business of the complainant in Chicago is in charge of a general manager for the States of Illinois and Wisconsin, who has supervision of the company's business, procuring applications or seeing that they are procured, collecting premiums, attending to the detail work, looking after disbursements, looking after losses and furnishing proofs, and who is the supreme authority in the State of Illinois in said company's business in all cases in the agency work, and is hereinafter called 'general agent.'

II.

"That on or about the 16th day of January, 1899, Herman D. Cable, then a resident of Evanston in the State of Illinois, made application in writing to the complainant, through one James F. McCabe, for insurance upon his life in the sum of fifty thousand dollars, which application was forwarded to the New York office of the complainant, and in consideration thereof, the complainant, on or about the sixth day of February, 1899, executed its policy, numbered 94,082, upon the life of the said Herman D. Cable, which policy agreed, in further consideration of the sum of $848.50, to be paid on the delivery thereof, and a like sum to be paid on the sixth day of February in each and every year thereafter, until ten (10) years' premiums should have been paid, and upon the acceptance of satisfactory proofs of the death of the said Herman D. Cable within ten (10) years ending on the sixth day of February, 1909, that the complainant would pay fifty thousand dollars ($50,000) in thirty

consecutive annual installments of one thousand six hundred sixty-six and sixty-six-hundredths dollars ($1,666.66) each to the estate of the said Herman D. Cable.

"The written application for the said policy was by the terms of the policy made a part of the policy itself, and was signed by the said Herman D. Cable, and one of the provisions of the said application was as follows, viz: 'It is hereby declared and agreed * * * that the policy to be issued hereon shall take effect only upon payment of the first premium and delivery of the policy, during my lifetime, sound health and insurable condition;' and another provision thereof was as follows, viz: 'That only the president, together with the secretary or the actuary, shall have the power to alter or waive the policy, or any condition thereof.'

III.

"At the same time when Cable applied for the above policy, a similar application was made to the complainant for a similar $50,000 policy by George S. Lord, who was a neighbor and intimate friend of Cable, and interested with him in numerous business transactions, both being directors of the Bankers' national bank and members of the Evanston school board. Both of the said policies were issued at about the same time, and both were forwarded from the New York office of the complainant to its Chicago office, and were received at the latter office on or before the 20th day of February, 1899, and on the last-named day they were turned over by the complainant's general agent at Chicago to one T. J. Finney.

IV.

"The said T. J. Finney was a life-insurance broker who was not regularly employed by the complainant or by any other company, but who had done business with the complainant through the said general agent, among other companies, for the past seven years, and had during the year 1898 procured other insurance on the life of the said Herman D. Cable in another company, which had lapsed in November, 1898. One James F. McCabe was also a life-insurance agent or broker who, in January, 1899, had a contract of employment with the Equitable Insurance Company of New York, and who had no connection or business arrangement with the complainant, except through the said Finney, and was not known to the general agent of the complainant at Chicago in connection with the Cable policy until about the time when the application therefor was delivered to the complainant's general agent in Chicago, and was not personally known to said general agent until March 5, 1899. Upon the delivery of the said two policies to Finney, the gross amounts of the premium due were charged against him by the complainant's general agent, and he subsequently paid to such general agent the amount due to the complainant out of such premiums.

V.

"The applications of both George S. Lord and Herman D. Cable for insurance were obtained from them by the said McCabe under an agreement with the said Finney, and when procured were delivered by him to Finney. After the two policies had been received by the complainant's general agent in Chicago and had been turned over by him to Finney as aforesaid, the latter in turn delivered them to the said McCabe, on the 21st day of February, 1899.

"Thereupon, on the same day, McCabe called first at the office of Herman D. Cable, having both of the said policies with him, but the said Cable refused to accept his policy at that time, stating that he did not have time to look into the matter at the moment, but that he would be guided a good deal by what Mr. Lord said and did in the matter.

"Afterwards, on the same day, McCabe called at Mr. Lord's office, found Mr. Lord very busy, and left his (Lord's) policy with him, together with a financial statement of the company, and told him that he might send him (McCabe) a check for it. On the same day McCabe returned the Cable policy to Finney.

VI.

"On the 27th day of February, 1899, McCabe again called upon George S. Lord and asked for payment of the premium on his policy. Mr. Lord thereupon asked him if he also had the Cable policy with him. McCabe stated that he had not, but that he could get it in a few minutes, whereupon Mr. Lord told him to get it, and he (Lord) would pay him the amount of both premiums. McCabe then went at once to Finney's office, procured the Cable policy from Mr. Finney, and returned with it to Mr. Lord's office, and handed it to Mr. Lord, saying as he did so 'Is Mr. Cable all right?' or words substantially to that effect. There was a conflict as to what Mr. Lord said in reply, but the master is of the opinion that the reply was substantially as Mr. Lord stated in his testimony, viz.: 'No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours.'

"Thereupon McCabe left the Cable policy with Mr. Lord, who already had his own policy, and Mr. Lord paid the premiums on both policies in currency, the premium on the Cable policy being eight hundred and forty-eight dollars and fifty cents ($848.50), and McCabe took the money to Mr. Finney, who subsequently paid to the complainant the amount due to it. Mr. Lord then took the Cable policy to Evanston, and delivered it to a member of Mr. Cable's family at the latter's house, in the evening of the same day.

"The master finds that Lord had been authorized in advance by Herman D. Cable to accept and pay for the latter's policy, in case he (the said Lord) decided to accept and pay for his own policy; and that the premium advanced by him was repaid to him after Cable's death by one of the relatives of the said Cable.

VII.

"Immediately after delivering the said two policies to Lord, McCabe went to Cleveland, Ohio, and while there he received, on March 2d, 1899, a telegram from Finney, reading as follows: 'Cable died this morning, was sick when policy delivered. Company want policy back. Am non-committal pending hearing from you. Have you any advice?' (See Complainant's Exhibit 3.)

"McCabe thereupon returned to Chicago on March 3d, 1899, and on that day informed Mr. Lord, and also the latter's attorney, Mr. H. H. C. Miller, that the complainant company demanded the return of the Cable policy.

VIII.

"The master finds that on the 21st day of February, 1899, when the policy in question was first presented to Herman D. Cable and he refused to receive it, he was in sound health and insurable condition; that on the 24th day of February, 1899, he was taken ill with incipient pneumonia, and was attended by a physician in the early evening of that day, and was put under the care of a trained nurse the same evening; that his disease developed into a case of acute pneumonia, and that he was seriously ill with that disease and confined to his bed from the evening of the 24th day of February, 1899, until March 2, 1899, when he died. That on the 27th day of February, 1899, the said Herman D. Cable was seriously ill with acute pneumonia and was not in good health, and was not in insurable condition, and that this was well known to the said George S. Lord when he procured the delivery to himself of the Cable policy, and paid the premium thereon, but that he did not communicate such knowledge to the said McCabe any further than by making the statement to him which has been set forth heretofore in finding VI; and the master finds that the said Lord's statement that Cable had been sick for two or three days, but was no worse than he had been the last forty-eight hours, while it was substantially true at the time when it was made, was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or to lead him to suspect it.

IX.

"The master further finds that up to the last day of said Cable's illness, the said illness was not such as to be regarded by his physician and friends as necessarily fatal; that up to the day before his death his attending physician expected him to recover, and so informed his family; that the immediate cause of his death was heart failure, or collapse, which was the result of his illness, and which is one of the common features of pneumonia.

X.

"The master further finds that none of the general officers of the complainant company, residing in New York city, had any personal knowledge that the said Herman D. Cable was taken ill at any time after the application for the policy in controversy was made, and that none of them had any personal knowledge until after his death that he was ill at any time between the date of the application and the date of his death; and that neither the said Finney nor the said McCabe (excepting the statement made to him by Lord on the delivery of the policy), nor the general agent of the complainant at Chicago, nor the complainant itself, had any knowledge or information as to the said Cable's condition of health at any time between the date of the application for the policy in question and March 2, 1899—but in making this and all other findings, the master expressly reserves the question as to whether the information conveyed by George S. Lord to McCabe was, or was not, such notice as to bind the complainant company and its representatives.

XI.

"That on or about the 16th day of March, 1899, the defendant, Alice A. Cable, was by the probate court of Cook county duly appointed as administratrix of the estate of the said Herman D. Cable, deceased, and qualified, and took upon herself the duties of such trust, and that as such administratrix she took possession of the said policy in controversy and has ever since been in possession of the same.

"That as such administratrix she filed with the complainant proof of the death of the said Herman D. Cable, and requested payment to her of the commuted value of the unpaid installments of $1,666.66 each, specified in the said policy, being the lump sum of thirty thousand dollars ($30,000), and that the complainant refused to pay the same, and that the defendant herein brought her action at law against the complainant in the superior court of Cook county, Illinois, on May 11, 1899, to recover $30,000 upon the policy offered in evidence in this case, as the commuted value of such policy; that such action was begun by the filing of a præcipe and the issuance of a summons on said day, about an hour prior to the filing of the original bill herein; that such summons was placed in the hands of the sheriff of Cook county for service upon the defendant immediately upon its issuance, and prior to the filing of the original bill herein, but was not served upon the complainant herein until May 15, 1899, and that no direction to the sheriff to delay the service of summons was given by the plaintiff in said action at law, or her attorney, which action at law is still pending and has never been called for trial, but now stands number 148 upon the new calendar of Judge Chytraus, which said judge began to call September 15, 1900.

XII.

"The master further finds that before the filing of the bill herein the complainant offered to pay to the defendant herein the amount of the first premium upon the policy in controversy, together with interest thereon, but the offer was refused by the said defendant, Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased.

XIII.

"The master finds that there has been no evidence adduced before him showing or tending to show that any of the conditions of the policy in controversy have been waived by the president and secretary or actuary of the complainant, or any or either of them; and also finds that the general agent of complainant in Chicago never authorized either said McCabe or said Finney to waive any of the conditions thereof, and never waived any of them himself.

XIV.

"That the said Herman D. Cable and George S. Lord, in the making of the application to the complainant and in the delivery of the policies and payment of the premiums thereon, had no dealings with any person other than the said James F. McCabe."

Before the filing of the report Alice A. Cable, administratrix, filed with the master certain objections to his report, which were apparently returned to the court by the master with his report and read as follows:

"First. For that the master has erroneously found that the statement made by George S. Lord to James F. McCabe as to the illness of Herman D. Cable was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it.

"Second. For that the said master has omitted to find that on the 27th day of February, 1899, it was the full belief of George S. Lord that said Cable was not dangerously sick, and that he would shortly recover from his then illness.

"Third. For that the said master has omitted to find that the information conveyed by the said George S. Lord to said James F. McCabe was sufficient notice of the illness of Herman D. Cable, at and before the time of the delivery of the policy and the payment of the premium thereon.

"In all of which particulars the said defendant objects to the said report, and submits that the same ought to be varied and altered."

On October 23, 1900, the court ordered that the objections referred to stand as exceptions to the report, and thereupon the cause was heard before the court. Afterward, on December 21, 1900, the court rendered a decree sustaining the first exception and disapproving of the second sentence in paragraph eight of the master's report, and made the following finding of fact in lieu thereof:

"That on the 27th day of February, 1899, the said Herman D. Cable was seriously ill with acute pneumonia and was not in good health and was not in insurable condition; and that the said George S. Lord when the Cable policy was delivered to him and the premium paid thereon was aware of such fact; that when said Lord was asked by McCabe, as the agent of the complainant as to the then condition of Herman D. Cable, he in good faith and without any intent to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, as heretofore found in finding VI, but that said Lord did not make any further statement in regard to the condition of said Cable, nor were any further inquiries made by said McCabe in regard thereto."

The decree overruled the second and third exceptions to the master's report and decreed that the policy in question "was procured on behalf of the said deceased by constructive fraud and that no actual fraud was intended or practiced in the delivery of the same, and that the complainant is entitled to the relief prayed for," and thereupon decreed that the policy be annulled and cancelled and declared to be of no force and effect as an obligation; that it be forthwith surrendered and delivered, and reserved jurisdiction to make such further order as might be necessary to secure the full and effectual execution of the decree, including power and jurisdiction to prevent the defendant from prosecuting any suit or action upon the policy. From this decree the defendant below appealed.

The complainant below also filed an assignment of errors, as follows:

"1. That the circuit court erred in and by said decree in finding that the master's report was made pursuant to the order of reference to said master, and in entertaining and acting upon exceptions thereto.

"2. That the circuit court erred in and by said decree in sustaining the following exception filed by the defendant to the master's report:

"First. For that the master has erroneously found that the statement made by George S. Lord to James F. McCabe as to the illness of Herman D. Cable was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it."

"3. That the circuit court erred in and by said decree in finding that at the time Lord procured from McCabe the Cable policy, Lord told McCabe that Herman D. Cable had been sick for two or three days but was no worse than he had been for the last forty-eight hours.

"4. Assuming that Lord made said statement as found, the circuit court erred in and by said decree in further finding that it was made by Lord in good faith and without any intent to defraud the complainant or to conceal the real condition of the health of said Cable.

"5. That the circuit court erred in and by said decree in finding

that no actual fraud was intended or practiced in the delivery of the policy of insurance mentioned in said decree.

"6. The circuit court erred in not finding that the delivery of the policy in controversy was procured by actual fraud.

"Wherefore the said complainant prays that the parts of said decree upon which error is above assigned may be changed and modified, and that as a basis for the relief granted by said decree a finding of fact be made that the delivery of the policy in controversy was procured from the complainant by actual fraud."

On the back of the policy under the title "Notice" it is provided:

"Agents have no power to modify or change this contract, nor extend time for premium payment, nor waive forfeiture."

JENKINS, circuit judge, after the foregoing statement of the case, delivered the opinion of the court.

The action of the master in reporting his findings of fact and his conclusions of law upon the evidence was without authority, the order of reference only providing for the taking and return of testimony. The court, however, modified and adopted the findings, and they must be regarded as the findings of the court. An assignment of error to the decree gives the right to a hearing here upon an error well assigned, although no exception was filed to the master's report.

The practice of filing with the master objections to a report proposed by him, and before it is made or reported to the court, which objections are returned by the master with his report, is without warrant in the correct equity practice obtaining in the Federal courts. Exceptions to a master's report should be made after it is filed, and should be presented to and filed with the court and not with the master.

It is a general rule that meditated silence, there being no duty to speak, will not avail to avoid a contract. There being no duty to communicate intelligence, the one party is not bound to speak although he may know that the other party lies under a mistake. This is because the parties are dealing with each other at arm's-length. But even in such case the *suppressio veri* must rest in silence, not in partial and misleading statement. The latter amounts to *suggestio falsi;* for, as it has well been said, "A half truth is often the greatest of lies." If one would deal at arm's-length, he must remain silent. He may not speak that which is certain to deceive and suppress that which would challenge attention, disclosing the truth. If the matter *be* with respect to a material fact which is known to the one party and not to the other would, if disclosed, induce that other to refrain from contracting, either wholly or upon the terms proposed, the one having knowledge of the fact, if under no duty to disclose, may not by a partial statement throw the other party off his guard, when disclosure of the truth and the whole truth would have prevented his action.

There is, however, a class of contracts not arising in confidential

relation, where there is a duty to speak, where silence is tantamount to fraud, because "the silence goes to the very essence of the transaction, preventing the existence of any contract, when the transaction takes the form of a contract, for want of union of minds between the parties." *Bigelow on Fraud*, 594. This class of contracts comprehends many subjects, and especially the subject of insurance. Thus in marine insurance, the applicant owes the duty of disclosure. If he conceals a material fact, whether or not he be inquired of concerning it, the policy is void, even though his silence arose from error of judgment and not from fraudulent intent. This is sometimes rested upon the ground that the silence is a breach of the condition precedent of every contract of marine insurance, "that the insured shall make full disclosure of all facts materially affecting the risk, which are within his personal knowledge at the time when the contract is made." *Blackburn v. Vigors*, 12 App. Cas., 531; *Arnould Marine Insurance*, 4 Eng. ed., 512. Thus where insurance was applied for upon a vessel "lost or not lost," the applicant knowing of its loss but concealing its knowledge from the insurer, the court held the concealment to be a fraud destroying the validity of the contract, remarking (p. 670) "When the company came to make this instrument, they were entitled to the information which the plaintiffs had of the loss of the vessel." *Insurance Company v. Lyman*, 15 Wall., 664.

So, also, with respect to fire insurance, it has been held that if one knowing of a conflagration near his property without disclosing the fact procure insurance of an underwriter ignorant of the fact, the contract is void. *Buff v. Turner*, 6 Taunt., 338. A well-considered case upon the subject of disclosure with respect to fire insurance is *Protection Insurance Company v. Harmer*, 2 Ohio St., 452, in which it is held by Ranney, J., that the doctrine of concealment as understood in marine insurance is not applicable in its full extent to fire policies, because the *corpus* is subject to inspection by either party; but that the assured must not misrepresent or designedly conceal a fact of unusual peril to the property not with reasonable diligence discoverable by the insurer, or anticipated as a foundation for specific inquiry.

In respect of marine insurance, one reason for the requirement of disclosure is that the *corpus* is often not accessible to the insurer, and reliance must be placed upon the good faith of the insured. In this respect life insurance is more nearly allied to marine than to fire insurance. It is true that a medical examination will ascertain many things necessary to be known; but there is a large field of inquiry which cannot be so disclosed, and which may be essential to the risk to be assumed. The past history of the insured, the diseases with which he had been afflicted, the duration of life of his ancestors, and their diseases, are all matters which go to the question of the assumption of the risk, and of which the insurer would naturally desire information. So also, in the interval between the medical examination and the execution and delivery of the policy, a serious change in the health of the assured may have occurred, of which the insurer might be, and probably would be, wholly ignorant. The insurer

has therefore a right to rely upon the utmost good faith upon the part of the assured, and though the latter may not be bound to communicate, if uninquired of, all the details of his life which might affect the judgment of the insurer with respect to the assumption of the risk, he is certainly bound to disclose any impending peril to life not known to the insurer, and of which the latter cannot reasonably be said to be put upon inquiry. It is the custom of insurance companies to act upon written or printed applications signed by the applicant containing answers to questions propounded. Generally, as is the fact here, by the terms of the contract the application is made part of and attached to the policy of insurance. In such case the answers to the questions are warranties, and no suggestion of immateriality of the question and answer can be entertained because it is for the insurer to judge of the materiality of the information demanded and of the reasons that shall determine the assumption of the risk.

In the case at bar, Cable in the application was inquired of whether he had ever been subject to or had pneumonia, to which he gave a negative answer. This application being made part of the contract, the statement is a warranty, and is so declared to be by the application. This statement, in the law, refers not merely to the date of the application, but to the time of the completion and delivery of the contract. And if after the statement is made a material change occur before the contract is consummated, the duty of disclosure on the part of the assured or the one receiving delivery of the policy for him, is absolute. The application of Cable covenanted that the policy should take effect only "upon payment of the first premium, and delivery of the policy during my lifetime, sound health and insurable condition." The statements in the application of good health and freedom from disease, and specifically from pneumonia, constitute a warranty of the contract as though declared simultaneously with the delivery of the policy. If there had been a change in health between the date of the application and the delivery of the policy, the company was entitled to know of it and to be fully informed concerning it, that it might determine whether, notwithstanding such change, it would consummate the agreement and deliver its policy; for, as stated in *Traill v. Baring*, 33 L. J. Ch. 521; 9 L. T. N. S. 708, on appeal 10 L. T. N. S. 215, if a person make a representation which is calculated to induce another to assume a particular liability, and the circumstances are afterwards, before the liability is assumed, so altered to the knowledge of the person making the representation, that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made it, the alteration in these circumstances; and a court of equity will not hold the person to whom he made the representation to be bound by any contract entered into upon the faith thereof, unless such communication has been made.

In *British Eq. Ins. Co. v. Great Western R. R. Co.*, 38 L. J. Ch. 132, 19 L. T. N. S., 476, in July a declaration was signed for insurance

upon life containing reference to the usual medical attendance of the proposed assured, who certified that the proposed assured was in good health. The assured was also required to state who was "his latest, if other than his usual, medical attendant." It was provided in the letter accepting the proposal and in the receipt for the first premium, that if any change had taken place in the health of the assured since the date of the medical examination, it would render the policy void. In August the assured consulted another physician, who discovered his patient to be suffering from disease of the kidneys. This fact was not communicated to the company, and the policy was delivered in September. Eight months afterwards the assured died of disease of the kidneys. It was held that the requirement to disclose his last medical attendant was a continuous one up to the date of the completion of the contract; that the non-communication of his visit to the physician in the interval between the signing of the application and the taking of the policy, voided the policy. This decree was affirmed upon appeal. 38 L. J. Ch. 314; 20 L. T. N. S. 422.

In *Morrison v. Muspratt*, 4 Bing. 60, one was represented to the insurers in December of a certain year by a physician as enjoying ordinarily a good state of health. This representation was repeated in March following and the insurance was effected in April. Between December and March the person had been ill with a pulmonary attack and was attended by a physician other than the one who had made the representations to the insurance company; but no disclosure of the circumstance was made to the insurer. In April, a year after the issuance of the policy, the assured died of pulmonary disease. This was a case of mere representation, not of warranty, and the court held that the facts of the illness and of the attendance of the other physician should have been disclosed. See also *Rose v. Med. Inv. & Gen. Life Ins. Assoc.*, 11 Ct. Sess. Cas. 2 series, 345; *Equitable Life Assurance Society v. McElroy*, 49 U. S. App. 548; 28 C. C. A. 365; 83 Fed. R. 631.

In *Piedmont and Arlington Life Insurance Company v. Ewing Administrator*, 92 U. S. 377, the applicant being *in extremis*, a friend paid the premium, but concealed from the agent the condition of the applicant. The agent delivered the policy in ignorance of the facts. The court held there was no valid contract, saying (p 380): "It cannot for a moment be contended that while parties are still in negotiation as to the terms of a contract, one of them, learning of a total change in the condition of the subject-matter of the contract of which the other is ignorant, can at that moment accept terms which he has refused before, and by so doing bind the party who has offered those terms when the condition of affairs was wholly different;" and at page 381, "To hold that when he was *in extremis*, an hour or two before he breathed his last, a friend should pay this small sum to an agent of the company, without the agent of the company having any idea of the condition of the dying man, and thus secure an obligation to pay his administrator $5000 within sixty or ninety days, is to affirm that one party to a negotiation can delay his assent to the terms of the contract until the changes of fortune enable him to

reap all the benefits, and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory."

There was, therefore, here both a warranty of good health and insurable condition at the time of the delivery of the policy; and whether the statements of the application be treated as warranty or as representations, they were continuing up to and were effective as representations or warranties at the time of the delivery of the policy. *May on Insurance*, 4th ed., vol. 1, sec. 190. Independent of these considerations, and growing out of the very nature of the subject-matter, there was the legal obligation resting upon Cable and upon those acting for him, to disclose any material change in his condition of health between the time of the application and the time of the delivery of the policy.

Was there such a change of health, and was the duty of disclosure performed? The application is dated January 16th, 1899, and by the contract is made a warranty, and as we have sought to show, that warranty speaks from the date of the delivery of the policy. That warranty was broken as soon as made, for at the time of the delivery of the policy he had pnuemonia, and that fact was not disclosed to the company, or to the one who for the company delivered the policy to Lord, the latter knowing of the fact.

It is, however, urged that sufficient information was disclosed by Lord to McCabe to put the company upon inquiry, and that, with such notice, McCabe delivered the policy and received the premium; that McCabe was the agent of the company and notice to him was notice to the company, and the delivery of the policy constituted a waiver of the condition and warranty. Upon the assumption that McCabe was such agent of the company and that his action must be treated as the action of the company—questions which we do not determine—it becomes us to inquire of the sufficiency of the notice given, and whether the act of delivery of the policy involved a waiver of the warranty.

On February 21, 1899, Cable had tentatively declined to accept the policy, desiring to be guided in his judgment by the action of his intimate friend Lord, who had made a like application upon his own life to the same company. The policy was thereupon returned by McCabe to Finney, the broker from whom he received it. The policy on Lord's life was on the same day left with him, and he was requested to send a check for the premium. Six days afterwards, and on the 27th of that month, McCabe called upon Lord and asked for the payment of the premium upon his policy. Lord asked him if he had the Cable policy, to which McCabe answered no, but that he could get it in a few minutes. Whereupon Lord told him to get it, and that he, Lord, would pay him the amount of both premiums. McCabe procured the Cable policy, returned with it to Lord's office and handed it to the latter, saying as he did so—"Cable is all right, isn't he?" Here occurs somewhat of a conflict in the evidence. McCabe says that Lord in a very low voice, without looking at him and in a casual manner, answered, "The same as he has been for forty-eight hours;" conveying to McCabe's mind the meaning that

Cable was all right. Lord says that he answered, "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." The master and the court below found the fact to be as stated by Lord; and while there is much in the testimony throwing doubt upon the correctness of this conclusion, we are content to take the fact as found by the master and adopted by the court. Lord at this time knew that Cable was seriously ill and that he was not in insurable condition. Lord was a man of affairs, actively interested in many important business adventures. He must have known, he was bound to know, that no sane man, fully informed of Cable's condition, would accept insurance and deliver a policy upon such a life. It was his duty to have disclosed the facts, and whether failure so to do arose from design or forgetfulness, the fraud upon the company was none the less. The wrong that was effected cannot be excused upon the ground that Lord did not intend to commit the wrong. Those whom he represented cannot be permitted to take the fruit of the wrong upon the ground that Lord was innocent of wrongful intent.

In *Sun Mutual Insurance Company v. Ocean Insurance Company*, 107 U. S., 485, 510, the court, speaking of the duty of disclosure in respect of insurance, says: "The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive."

Nor do we think that the statement was such that a reasonable man would have been put upon inquiry. It was a casual statement, partial and misleading, and the manner of its delivery was in our judgment such as to ward off rather than to invite inquiry, and to convey to McCabe the impression that Cable was, if at all, but slightly indisposed. In order to preclude the insurance company by the action of McCabe, the latter should have been fully informed of the situation; for a waiver cannot be predicated upon a partial and a misleading statement. It was held in *Sun Mutual Insurance Company v. Ocean Insurance Company*, 107 U. S., 485, that it was the duty of the assured to communicate all material facts, and he cannot allege as an excuse for his omission to do so that they were actually known to the underwriter, unless the knowledge of the latter was as full and particular as his own information. A waiver is an intentional relinquishment of a known right, an election by one to dispense with something of value, or to forego some advantage that might be insisted upon. A waiver exists only where one with full knowledge of a material fact, does or forebears to do something inconsistent with the existence of the right, or of his intention to rely upon that right. *Bishop on Contracts*, sec. 792. Waiver is but another name for estoppel. "It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts, of those which create the forfeiture, and of those which will necessarily influence its judgment

in consenting to waive it. The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the assured being *in extremis*, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policy-holder, instead of protecting him against the commission of one by the company." *Insurance Company v. Wolff*, 97 U. S. 326, 333.

It cannot here be doubted that if the insurance company or McCabe as its agent had been informed of the fact, within the personal knowledge of Lord, that Cable was seriously ill with acute pneumonia, the policy would not have been delivered. It is difficult for us to believe that Lord, with that knowledge, could think he had a right to accept this policy; but whether so or not, the concealment of the fact was a fraud upon the company. The statement made was deceptive and misleading, whatever were the intentions of Lord, and a court of equity ought not to permit the completion of the wrong. Courts of equity cannot sustain an insurance upon the life of a dying man, when the nature of his malady and the seriousness of his illness are concealed from the insurer.

It was suggested that in view of the decision of the Supreme Court in *Farmers' Loan and Trust Company v. Lake Street Elevated Railroad Company*, 177 U. S. 51, we should reconsider our former judgment in this case, and dismiss the bill for want of jurisdiction. We are unable to see that the decision referred to is in conflict, but whether so or not, the previous judgment of this court is *res judicata* between these parties, and we are without authority to disturb it. In this connection and upon the question of jurisdiction the case of *Ogden City v. Weaver*, 108 Fed. R. 564, 567, may prove of interest.

GROSSCUP, *Circuit Judge:*

The jurisdictional question was settled on the former appeal. Under our ruling in *Supreme Lodge Knights of Pythias v. Lloyd*, 107 Fed. R. 870, that decision becomes a part of the law of this case. With the jurisdictional question out of the way, I concur in the foregoing opinion.

The decree is affirmed.

Woods, circuit judge, sat at the hearing of this cause and concurred in the conclusion reached, but departed this life before the preparation of this opinion.

On consideration whereof, it is now ordered, adjudged and decreed, by this court, that the decree of the circuit court in this cause, be, and the same is hereby affirmed with costs.

Certificate of Clerk.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 22, inclusive, contain a true copy of the papers filed and proceedings had thereon (except briefs of counsel) in the United States circuit court of appeals for the seventh circuit, in the case of Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, *vs.* United States Life Insurance Company in the City of New York, No. 762, October term, 1901, as the same remains upon the files and records of the United States circuit court of appeals for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this thirtieth day of January, A. D. 1902.

{Seal United States Circuit Court of Appeals, Seventh Circuit.}

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

3471

179

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1900.

No. 775.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Appellant,

vs.

ALICE A. CABLE, ADMINISTRATRIX OF THE ESTATE OF HERMAN D. CABLE, DECEASED,
Appellee.

MR. GILBERT E. PORTER,
MR. WILLIAM G. BEALE,
MR. EDWARD S. ISHAM,
Counsel for Appellant.

MR. H. H. C. MILLER,
MR. F. S. SHAW,
MR. W. S. OPPENHEIM,
Counsel for Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Order

3 UNITED STATES CIRCUIT COURT

Northern District of Illinois,

Northern Division.

The United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, Administratrix of the Estate of Herman D. Cable, Deceased,
} In Chancery.
25,164

Be it remembered that on this day to-wit: the twenty third day of February, 1901, being one of the days of the Regular December term of said court, 1900, in the record of proceedings in the above entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

ORDER OF FEBRUARY 23, 1901.

The United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, Administratrix of the Estate of Herman D. Cable, deceased.
} 25,164

Laeve is hereby given the complainant to file the Opinion herein, *nunc pro tunc* as of December twenty first, 1900.

5 And on to-wit: the 23rd day of February, 1901, there was filed in the clerk's office of said court *nunc pro tunc* as of December 21, 1900, a certain opinion in words and figures following to-wit:

OPINION.

IN THE UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Northern Division.

U. S. Life Insurance Company,
v.
Cable, Administratrix, etc. } No. 25,163.

Kohlsaat, District Judge.

In this case I am of the opinion that as a matter of law the delivery of the policy in question herein was not consummated until its receipt by Mr. Lord, and that at the time of such delivery he did not as a matter of fact fully disclose to the agent of complainant, who brought the policy to him, the serious nature of the illness of defendant's decedent. The evidence discloses no intentional fraud on the part of Mr. Lord in this regard, but simply that in the hurry of business his remarks as to the illness of Mr Cable were not sufficient to apprise the agent of complainant of the actual nature of such illness, which was a material matter affecting the intended contract between complainant and Mr. Cable which was to be evidenced by said policy. On this ground I am of the opinion that the delivery of said policy to Mr. Lord was induced by what in law should be considered constructive fraud.

A decree may be prepared in accordance with the foregoing opinion, directing the cancellation and delivery to complainant of the policy in question, upon the payment by complainant of the premium received by it on account thereof. The costs of this proceeding will be taxed against the defendant.

(Endorsed) Filed Feb. 23, 1901, as of Dec. 21, 1900.
S. W. BURNHAM,
Clerk.

6 And on to-wit the 21st day of February, 1901, came The United States Life Insurance Company in the City of New York by its solicitors and filed in the clerk's office of said court its Petition for Appeal and assignment of errors in words and figures following to-wit:

PETITION FOR APPEAL.

United States of America,
Northern District of Illinois,
Northern Division.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Northern District of Illinois.

The United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, Administratrix of the Estate of Herman D. Cable, Deceased.
In Equity. No. 25,163.

Petition for Appeal.

This petitioner, the above named complainant The United States Life Insurance Company in the City of New York, represents that from the decree heretofore entered in the above entitled cause on the 21st day of December, 1900, the defendant has prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh Circuit; that the petitioner is satisfied with the ordering part of said decree directing the policy therein mentioned to be delivered up and cancelled, but conceives that this court erred in making certain findings set forth in said decree; and that this petitioner fears that
7 upon the hearing of the said appeal prosecuted by the defendant, the Circuit Court of Appeals might refuse to review such findings at the instance of this petitioner in the absence of an appeal taken by it therefrom.

Your petitioner does, therefore, hereby pray an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from such parts in said decree as are hereinafter designated, but not from the part of said decree annulling and cancelling, and directing to be surrendered and delivered to the petitioner or to its solicitors, the said policy of insurance.

The parts of said decree hereby appealed from are as follows, to-wit:

That part wherein the court sustained the first exception filed by the defendant to the Master's Report, and disapproved of that portion of finding VIII of said Report specifically set forth in the decree; also, that part wherein the court found as follows, to-wit: "That when said Lord was asked by McCabe as the agent of the complainant

as to the then condition of Herman D. Cable, he in good faith and without any intent to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, as heretofore found in finding VI"; also, that part wherein the court approved and confirmed the Master's Report as modified by the court; also, that part wherein the court found and determined that the facts found by the Master as modified by the court were true; and also, that part wherein the court found and determined that no actual fraud was intended or practiced in the
8 delivery of the policy mentioned in the decree.

The reasons for which this appeal is taken are set forth in the Assignments of Error attached hereto, and which are filed herewith.

And this complainant prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

Chicago, Illinois, February 21st, 1901.

ISHAM, LINCOLN & BEALE,
Solicitors for Complainant, The United States Life Insurance Company in the City of New York.

9 United States of America,
Northern District of Illinois,
Northern Division.

IN THE CIRCUIT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

The United States Life Insurance Company in the City of New York.
vs
Alice A. Cable, Administratrix of the Estate of Herman D. Cable, Deceased.

In Equity.
No. 25,163.

ASSIGNMENTS OF ERROR.

Now comes the Complainant, The United States Life Insurance Company in the City of New York, who has prayed an appeal from certain parts of the decree entered herein on the 21st day of December, A. D. 1900, and hereby assigns the following errors upon the record in this cause:

Assignment of Errors.

1. That the Circuit Court erred in and by said decree in finding that the Master's Report was made pursuant to the order of reference to said Master, and in entertaining and acting upon exceptions thereto.

2. That the Circuit Court erred in and by said decree in sustaining the following exception filed by the defendant to the Master's Report:

"First. For that the Master has erroneously found that the statement made by George S. Lord to James F. McCabe as to the illness of Herman D. Cable was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it."

3. That the Circuit Court erred in and by said decree in finding that at the time Lord procured from McCabe the Cable policy, Lord told McCabe that Herman D. Cable had been sick for two or three days but was no worse than he had been for the last forty-eight hours.

4. Assuming that Lord made said statement as found, the Circuit Court erred in and by said decree in further finding that it was made by Lord in good faith and without any intent to defraud the complainant or to conceal the real condition of the health of said Cable.

5. That the Circuit Court erred in and by said decree in finding that no actual fraud was intended or practiced in the delivery of the policy of insurance mentioned in said decree.

6. The Circuit Court erred in not finding that the delivery of the policy in controversy was procured by actual fraud.

Wherefore, the said complainant prays that the parts of said decree upon which error is above assigned may be changed and modified, and that as a basis for the relief granted by said decree a finding of fact be made that the delivery of the policy in controversy was procured from the complainant by actual fraud.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
By ISHAM, LINCOLN & BEALE,
Its Solicitors.

ISHAM, LINCOLN & BEALE,
Solicitors for Complainant.

(Endorsed) Filed Feb. 21, 1901.

S. W. BURNHAM,
Clerk.

11 And on to-wit: the 21st day of February, 1901, being one of the days of the regular December term of said court, 1900, in the record of proceedings in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

ORDER OF FEBRUARY 21, 1901.

The United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased.
} 25,163.

On motion of the complainant by Messrs. Isham, Lincoln and Beale, its solicitors, and on filing its Petition for Appeal, Assignment of Errors and Bond on appeal duly approved by the Court, It is ordered that an appeal be and the same is allowed to the United States Circuit Court of Appeals for the Seventh Circuit from the decree entered herein on the twenty first day of December, 1900, and that a certified transcript of the proceedings had of record herein, be forthwith transmitted to the United States Circuit Court of Appeals for this Circuit.

And on to-wit: the 21st day of February, 1901, there was filed in the clerk's office of said court a certain bond on appeal in words and figures following to-wit:

12 Know all Men by these Presents, That we, The United States Life Insurance Company in the City of New York, as principal, and William G. Beale, as surety, are held and firmly bound unto Alice A. Cable, Administratrix of the estate of Herman D. Cable, deceased, in the full and just sum of Two Hundred (200) Dollars to be paid to the said Alice A. Cable, Administratrix, as aforesaid, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of February, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at the December Term of the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division, in a suit depending in said Court, between The United States Life Insurance Company in the City of New York, complainant, and Alice A. Cable, Administratrix, of the Estate of Herman D. Cable, deceased, defendant, a decree was rendered against the said Alice A. Cable, Administratrix, as aforesaid, on the 21st day of December, A. D.

1900, and the said The United States Life Insurance Company, in the City of New York, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to change and modify certain parts of the decree in the aforesaid suit, and a citation directed to the said Alice A. Cable, Administratrix, as aforesaid, citing and admonishing her to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within 30 days from the date hereof.

Now the condition of the above obligation is such, That if the said The United States Life Insurance Company, in the City of New York shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, (Seal.)
By ISHAM, LINCOLN & BEALE, (Seal.)
Its Solicitors.
(Seal.)

WILLIAM G. BEALE.

Sealed and delivered in the presence of—
BUELL McKEEVER.

Approved by—Feb. 21, 1901.
KOHLSAAT, J.

O. K. W. S. OPPENHEIM.

(Endorsed) Filed Feb., 21, 1901.
S. W. BURNHAM,
Clerk.

13 And on to-wit: the 26th day of February, 1901, there was filed in the clerk's office of said court a certain stipulation in words and figures following to-wit:

STIPULATION.

The United States Life Insurance Company,
vs.
Alice A. Cable, Administratrix.
} No. 25,163.

It Is Hereby Stipulated and Agreed by and between the parties that the Clerk in making up the record for the complainant on its Cross-appeal herein may use only such parts of the record which do not appear in the transcript of appeal heretofore taken by the defendants and filed in the United States Circuit Court of Appeals for the Seventh Circuit, and

It is hereby further stipulated and agreed that the said cross-appeal of the complainant herein when filed in said Circuit Court of Appeals may be printed as a part of the original record now on file in said court.

ISHAM, LINCOLN & BEALE,
Solicitors for complainant.
H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for defendants.

(Endorsed) Filed Feb. 26, 1901.

S. W. BURNHAM,
Clerk.

2 CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois.

The United States Life Insurance Company in the City of New York,
vs.
Alice A. Cable, Administratrix of the Estate of Herman D. Cable, dec'd.
} No. 25,164.

To S. W. Burnham, Esq., Clerk of said Court:

In preparing the transcript of record for use in the United States Circuit Court of Appeals for the Seventh Circuit, upon the appeal this day taked by the complainant herein, you are hereby requested to include within such transcript only such proceedings as have been taken subsequent to the 9th day of January, 1901.

ISHAM, LINCOLN & BEALE,
Solicitors for said Complainant.

Dated February 21, 1901.

(Endorsed) Filed Feb. 21, 1901.

S. W. BURNHAM,
Clerk.

Citation.

Northern District of Illinois, } ss.
Northern Division. }

I, S. W. Burnham, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the Opinion filed February 23, 1901, as of December 21, 1900, and all proceedings had of record in said court subsequent to the ninth day of January, 1901, in the cause entitled The United States Life Insurance Company in the city of New York vs. Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, as the same appear from the original records and files of said court now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said District this 28th day of February, 1901.

S. W. BURNHAM,
Clerk.

(Seal)

United States } ss.
of America. }

The President of the United States, To Alice A. Cable, Administratrix of the Estate of Herman D. Cable, deceased, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit to be holden at Chicago, Ill., within thirty days from the date hereof, pursuant to an order allowing appeal made by the Circuit Court of the United States for the Northern District of Illinois, Northern Division, wherein The United States Life Insurance Company in the City of New York is appellant and you are appellee, to show cause, if any there be, why the decree rendered against you as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable C. C. Kohlsaat, Judge of the District Court of the United States, this 21st day of February in the year of our Lord one thousand nine hundred and one.

KOHLSAAT.

Service accepted Feb. 21, 1901.

H. H. C. MILLER.

(Endorsed) Filed Feb. 21, 1901.

S. W. BURNHAM,
Clerk.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on the second day of October, 1900, of the October term, in the year of our Lord one thousand nine hundred, and of our Independence the one hundred and twenty-fifth.

And afterwards, to wit: on the sixth day of March, 1901, in the October term last aforesaid, came the appellant, by its counsel Mr. Gilbert E. Porter, Mr. William G. Beale and Mr. Edward S. Isham, and filed in the office of the clerk of this court their appearances, which appearances are in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1900.

THE UNITED STATES LIFE INSURANCE COMPANY
vs.
ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased. } No. 775.

The clerk will enter *my* appearance as counsel for the appellant.

GILBERT E. PORTER.
WILLIAM G. BEALE.
EDWARD S. ISHAM.

Endorsed: Filed Mar. 6, 1901. Edward M. Holloway, clerk.

And afterwards, to wit: on the seventh day of March, 1901, in the October term last aforesaid, came the appellee, by her counsel Mr. H. H. C. Miller and Mr. W. S. Oppenheim, and filed in the office of the clerk of this court their appearances, which appearances are in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1900.

THE UNITED STATES LIFE INSURANCE COMPANY, ETC., Appellant,
vs.
ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased. } No. 775.

The clerk will enter *my* appearance as counsel for the appellee.

H. H. C. MILLER.
W. S. OPPENHEIM.

Endorsed: Filed Mar. 7, 1901. Edward M. Holloway, clerk.

And afterwards, to wit: on the ninth day of April, 1901, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, *April* 9, 1901.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge presiding; Hon. James G. Jenkins, circuit judge; Hon. Peter S. Grosscup, circuit judge.

THE UNITED STATES LIFE INSURANCE COMPANY, ETC.,
vs.
ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased. } 775.

Cross-appeal from the circuit court of the United States for the northern district of Illinois, northern division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing April 11, 1901.

And afterwards, to wit: on the eleventh day of April, 1901, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

THURSDAY, *April* 11, 1901.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Peter S. Grosscup, circuit judge.

UNITED STATES LIFE INSURANCE COMPANY, ETC.,
vs.
ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased. } 775.

Cross-appeal from the circuit court of the United States for the northern district of Illinois, northern division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. William G. Beale, counsel for appellant, and by Mr. W. S. Oppenheim, counsel for appellee, and the court having heard the same takes this matter under advisement.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the *the* United States court-rooms, in the city of Chicago, in said seventh circuit, on the first day of October, 1901, of the October term, in the year of our Lord one thousand nine hundred and one and of our Independence the one hundred and twenty-sixth.

And afterwards, to wit, on the first day of October, 1901, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, *October* 1, 1901.

Present: Hon. James G. Jenkins, circuit judge, presiding; Hon. Peter S. Grosscup, circuit judge; Hon. William H. Seaman, district judge.

Order.

It is ordered by the court that William H. Seaman, judge of the district court of the United States for the eastern district of Wisconsin, be designated and assigned to sit in this court as a member thereof during the present session.

Thereupon said Seaman appeared and took his seat as a member of said court.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY of New York
vs.
ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased. } 775.

Cross-appeal from the circuit court of the United States for the northern district of Illinois, northern division.

Now again this cause comes on to be considered on the opinion of the judges before whom it was heard, which opinion is as follows:

(The opinion is omitted being inserted in the transcript of proceedings in this court in cause No. 762, Alice A. Cable, administratrix, etc., *vs.* The United States Life Insurance Company, etc.)

On consideration whereof, it is now ordered, adjudged and decreed by this court that this cause be, and the same is hereby dismissed, each party to pay their own costs.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages numbered from 1 to 9 inclusive, constitutes one of the copies of the printed record filed in this court on the eighth day of March, 1901, in cause No. 775, wherein The United States Life Insurance Company in the City of New York was appellant, and Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, was appellee, which copies were prepared for the printer, indexed, supervised and distributed by me in accordance with the rules of this court; that said cause was heard and determined by the United States circuit court of appeals for the seventh circuit together with cause No. 762, in said court, wherein Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, was appellant, and the said The United States Life Insurance Company in the City of New York, was appellee, both of which causes were appeals from the same decree; that in deciding said two causes

said court rendered but one opinion, which was entitled in bot causes; that a true copy of said opinion is set forth in the certifie transcript of the record and proceedings in said cause No. 762, whic was heretofore filed in the Supreme Court of the United States i the matter of the petition for writ of certiorari in said cause No. 762 and that the foregoing typewritten pages numbered from 1 to 5, in clusive, together with said opinion, constitute a complete transcrip of the proceedings in said cause No. 775, in said United States ci cuit court of appeals for the seventh circuit, subsequent to the filin of the printed record.

In testimony whereof, I hereunto subscribe my name and affi the seal of said United States circuit court of appeals for the sevent circuit, at the city of Chicago, this tenth day of May in the year o our Lord one thousand nine hundred and two.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable th judges of the United States circuit court of appeals for the sevent circuit, Greeting:

Being informed that there is now pending before you a suit i which Alice A. Cable, administratrix of the estate of Herman I Cable, deceased, is appellant, and United States Life Insuranc Company in the City of New York is appellee which suit was r moved into the said circuit court of appeals by virtue of an appe from the circuit court of the United States for the northern distri of Illinois, and we, being willing for certain reasons that the sai cause and the record and proceedings therein should be cert fied by the said circuit court of appeals and removed into th Supreme Court of the United States, do hereby command yo that you send without delay to the said Supreme Court, a aforesaid, the record and proceedings in said cause, so that th said Supreme Court may act thereon as of right and according t law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of th United States, the second day of May, in the year of our Lord on thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 18,475. Supreme Court of the Unite States. No. 622, October term, 1901. Alice A. Cable, administratri &c., *vs.* United States Life Insurance Co. Filed May 6 190 Edward M. Holloway, clerk. Writ of certiorari.

UNITED STATES OF AMERICA, } ss:
Seventh Circuit, }

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appellant, and The United States Life Insurance Company in the City of New York, appellee, together with the certified copy of the transcript of the record (except opinion) in the case of The United States Life Insurance Company in the City of New York, appellant, *vs.* Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appellee, is a full, true and complete transcript of the record upon which the said cause was heard in the United States circuit court of appeals, for the seventh circuit, together with all proceedings in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, Illinois, this twenty-seventh day of May, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

In the United States Circuit Court of Appeals for the Seventh Circuit.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased,
vs.
THE UNITED STATES LIFE INSURANCE COMPANY IN THE City of New York. } No. 762.

Appeal from the circuit court of the United States for the northern district of Illinois, northern division.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE City of New York
vs.
ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, Deceased. } No. 775.

Appeal from the circuit court of the United States for the northern district of Illinois, northern division.

It is stipulated by and between the parties to these causes by their respective counsel that the printed volume heretofore filed in the

Supreme Court of the United States in the matter of the petition for a writ of certiorari made in said above-entitled cause number 762 (which volume contains a certified copy of the record and proceedings in this court in said cause number 762, and also a certified copy of the record and proceedings in this court in cause number 622), shall, together with a certified transcript of the record and proceedings in this court (except the opinion) in the above-entitled cause number 775, be taken as a return to the writ of certiorari issued by the Supreme Court of the United States on May 2, 1902, in the above-entitled cause number 762.

Inasmuch as said above-entitled causes numbered 762 and 775 were heard together in said United States circuit court of appeals, and the said cause number 775 was heard and considered upon the records filed in that court in both of said above-entitled causes, and but one opinion was rendered entitled in both of such causes, it is further stipulated that upon the hearing in the Supreme Court of the United States of said cause number 762, wherein said writ of certiorari was granted, the Supreme Court may also hear and determine said cause number 775 and pass upon the assignments of error therein made, with like effect as if a writ of certiorari had also been granted in said cause number 775 upon petition of said The United States Life Insurance Company in the City of New York.

H. H. C. MILLER AND
W. S. OPPENHEIM,
Solicitors for Alice A. Cable, Administratrix, etc.
GILBERT E. PORTER,
WILLIAM G. BEALE,
Solicitors for the United States Life Insurance Company in the City of New York.

Endorsed: Filed May 27, 1902. Edward M. Holloway, clerk.
[Endorsed:] File No. 18,475. Supreme Court U. S. October term, 1902. Term No. 290. Alice A. Cable adm'x &c. petitioner *vs.* The U. S. Life Insurance Company in the City of New York. Writ of certiorari and return. Filed May 29", 1902.

In the Supreme Court of the United States, October Term, A. D. 1902.

ALICE A. CABLE, Administratrix, Petitioner,
vs.
THE UNITED STATES LIFE INSURANCE COMPANY IN THE City of New York, Respondent.
} No. 290.

It is hereby stipulated and agreed by and between the parties that the clerk in printing the record for the court in the above-entitled cause, may omit the transcript of the proceedings in case #622

in the circuit court of appeals for the seventh circuit, the same matter being contained in the transcript of case # 762.

H. H. C. MILLER,
Solicitor for Petitioner.
WILLIAM G. BEALE,
Solicitor for Respondent.

[Endorsed:] File No. 18,475. Supreme Court U. S. October term, 1902. Term No. 290. Alice A. Cable adm'x &c. petitioner, *vs.* The U. S. Life Ins. Co. of New York City. Stipulation to omit part of record in printing. Filed March 5", 1903.

Supreme Court of the United States

OCTOBER TERM, A. D. 1915

ALICE A. CAHILL, Administratrix, etc., of the Estate of Thomas F. Cahill, deceased,

Plaintiff,

vs.

THE UNITED STATES LIFE INSURANCE CO. IN THE CITY OF NEW YORK,

Defendant.

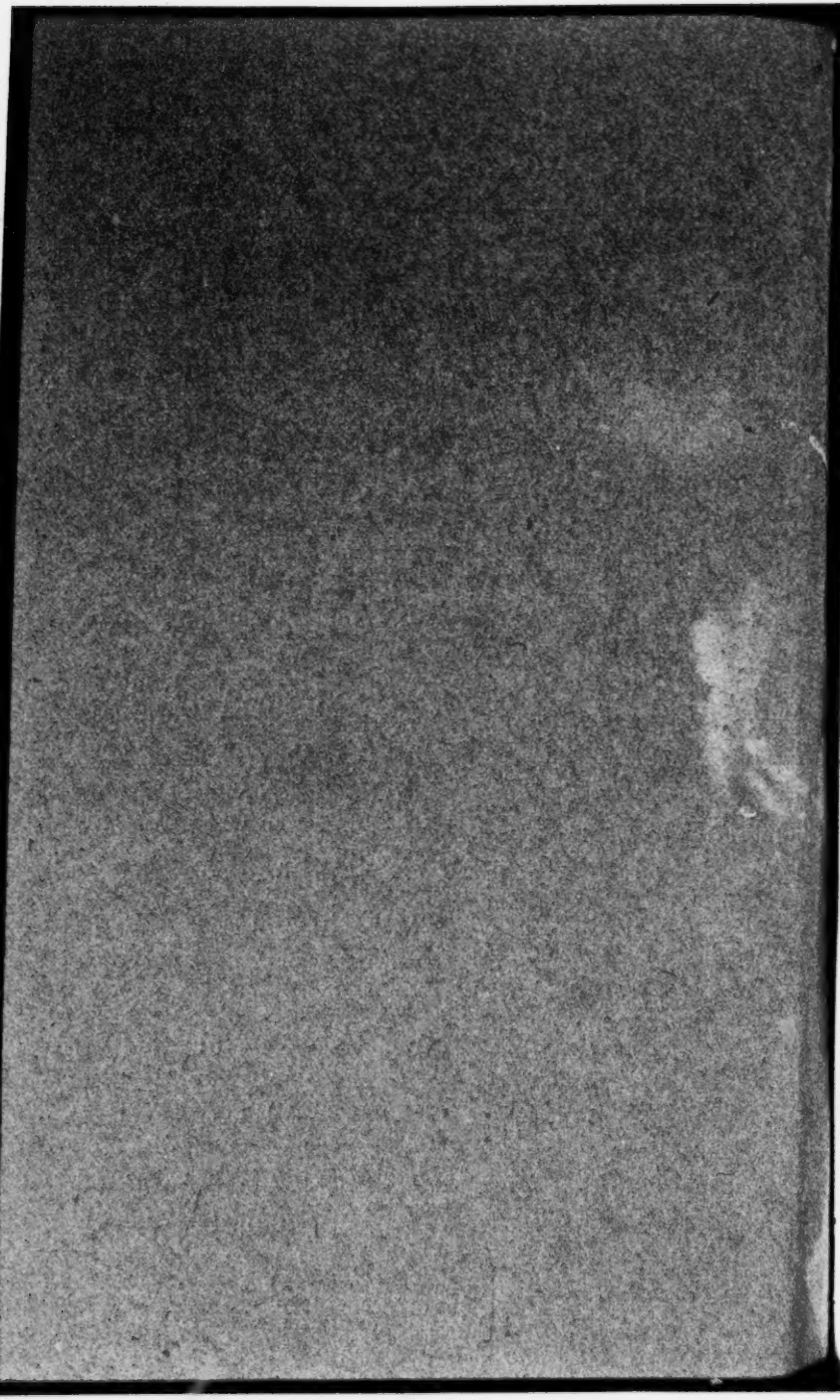
PETITION FOR WRIT OF CERTIORARI

TO REVIEW THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO ORDER CERTIFIED TO THIS COURT FOR REVIEW AND DETERMINATION THE CAUSE OF ALICE A. CAHILL, ADMINISTRATRIX, ETC., OF THE ESTATE OF THOMAS F. CAHILL, DECEASED, PLAINTIFF-APPELLANT, VS. THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, DEFENDANT-APPELLEE.

BRIEF AND ARGUMENT IN SUPPORT OF SAID PETITION.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors and Counsel.

The Rumsey-Brown Printing Company, 27 Quincy St., Chicago.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Requiring the Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its Review and Determination the case of Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, vs. The United States Life Insurance Company in the City of New York.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

ALICE A. CABLE, Administratrix of the Estate of Hermam D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

BRIEF AND ARGUMENT.

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the case of Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appellant, *vs.* The United States Life Insurance Company in the City of New York, appellee:

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court:

Your petitioner, Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, respectfully represents unto your Honors

First. That on or about the 11th day of May, 1899, peti-

tioner herein instituted an action in assumpsit in the Superior Court of Cook County, Illinois, against the respondent, on a life insurance policy issued by the respondent to one Herman D. Cable, under date of February 6, 1899, which policy provided for the payment of $50,000 in thirty consecutive annual installments of $1,666.66 each to the estate of said Cable, or the commuted value of $30,000 cash.

Second. That the respondent being a citizen of the State of New York, an hour or an hour and a half after the bringing of the said suit in the state court, filed its bill of complaint in the Circuit Court of the United States for the Northern District of Illinois against your petitioner, a citizen of Illinois, praying for the cancellation of the policy sued on in the state court and also for an injunction against your petitioner prosecuting any action against it, in the state court, on such policy. To this bill, your petitioner filed a demurrer setting forth as grounds: (1) That the bill did not state such a case as entitled the respondent to any relief in a court of equity; (2) That respondent had a full, adequate and complete remedy at law.

Third. That on the 30th day of June, 1899, the respondent having first obtained leave, filed its amended and supplemental bill in the said Circuit Court of the United States, charging diversity of citizenship, and that it was engaged in the business of insuring lives throughout the United States; that on the 17th day of February, 1899, it had executed a policy of insurance on the life of Herman D. Cable for the sum of $50,000 and had transmitted such policy to its agent at Chicago, Illinois; that such policy was tendered to said Cable on the 21st day of February, 1899, who refused to receive it, stating that

he desired further information concerning the respondent; that subsequently said Cable fell ill of pneumonia and on the 27th day of February, 1899, his life was dispaired of, and that on said day George S. Lord fraudulently procured the Cable policy from the respondent by concealing the fact of the illness of Cable, and paid the premium out of his own funds; that the delivery of the policy was without the authority or knowledge of Cable, and that the defendant company was ignorant of the illness of Cable until after his death, which occurred the third day subsequent to the delivery of the policy.

It was further alleged that suit was brought prior to the filing of the bill by petitioner in the state court against the respondent for the amount of the policy, and that under the Constitution and laws of the United States the respondent had the right to remove said action at law to the Circuit Court of the United States, but that the State of Illinois by legislative enactment had sought to prevent the removal by insurance companies of such actions, and had practically destroyed such right, inasmuch as such statute provides that an insurance company shall forfeit and lose its right to do business in the State of Illinois upon removing any such action to the United States Court. It also averred that the laws of the State of Illinois, as interpreted by its highest legal tribunal, are somewhat different from the laws of the United States as interpreted by the Federal courts upon the same question, and that the rulings of the state court were unduly and erroneously adverse to insurance companies, and that, under the facts and circumstances set forth in the bill, the respondent would be without a due and proper remedy in the state courts in respect to the claim of petitioner. Respondent demanded a cancellation of the policy and an injunction against petitioner prosecuting her cause in the state courts

The demurrer filed to the original bill was ordered to stand to the amended and supplemental bill and upon argument before the Hon. Christian C. Kohlsaat, in said Circuit Court of the United States, was sustained and a decree entered dismissing the bill for the reason that the respondent had a full, complete and adequate remedy, by making its defense to the action at law brought against t in the state court.

Fourth. And your petitioner further shows that afterwards, on the 10th day of July, 1899, an appeal in said cause was duly allowed and issued from the Circuit Court of Appeals for the Seventh Circuit upon the petition of respondent and it was ordered that a certified transcript of the record and of all proceedings in said cause be forthwith transmitted to the United States Circuit Court of Appeals and that afterwards, on the 1st day of August, 1899, a certified transcript of the record and of all proceedings of said Circuit Court in said cause was filed in the United States Circuit Court of Appeals for the Seventh Circuit, and the said cause was entered and admitted in said Court of Appeals and entitled United States Life Insurance Company in the City of New York, appellant, *vs.* Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appe'lee.

Fifth. That said cause came on to be heard in said Circuit Court of Appeals on the 27th day of October, 1899, before the Honorable William A. Woods, United States Circuit Judge for the Seventh Circuit, Honorable Romanzo Bunn, United States District Judge for the Western District of Wisconsin, and Honorable William A. Allen, United States District Judge for the Southern District of Illinois, and was duly tried in said court, and on the 2d day of January, 1900, the court entered a final judgment, reversing the

decree of the Circuit Court and remanding said cause for further proceedings. The Honorable Romanzo Bunn, District Judge, in delivering the opinion of said court and reversing the said decree gave the following grounds therefor:

"A suit at law has been commenced in the state court of Illinois to recover upon the policy. And if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court, under the circumstances set out in the bill, then the United States Circuit Court in equity should disclaim jurisdiction, but there are two reasons why we think the remedy thus open to the plaintiff of having its rights determined in an action at law, does not meet the requirements of the rule: The first is, that the plaintiff being a citizen of New York and the defendant a citizen of Illinois, the plaintiff, under the constitution, has the right to come to the Federal court for an adjudication. For a person entitled to litigate in the Federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. Second, the remedy open to the plaintiff is one not under its own control, but in the control and discretion of the opposite party."

Sixth. That on the 3d day of February, 1900, an order was entered in the Circuit Court of the United States redocketing said cause, setting aside the decree entered therein and directing the defendant to answer the amended and supplemental bill, and on the 13th day of February, 1900, an answer was filed by the petitioner in which is expressly denied the alleged fraud in the procurement of the policy, affirming that the respondent had full notice of the illness of Cable at the time of the delivery of the policy; that its procurement was obtained by the express authority of Mr. Cable and the premium paid out of his funds; that Cable was not dangerously ill at the time of the delivery of the policy, and that no danger of death was then apprehended by himself or family.

Petitioner further alleged that before respondent had become entitled to do business in the State of Illinois, it had filed its written agreement to not remove or make application to remove by the United States Court any action or proceeding commenced against it in the state courts, upon any claim or cause of action arising out of any business transaction done in said state, and was granted a license by said state to do business on the basis of said agreement; and that it was further provided by the laws of Illinois, that should the respondent fail to keep its said agreement, then it was the duty of the authorities of the state to revoke respondent's license to do further business in this state, but denied that the laws of the state upon questions involved in this suit as interpreted by its highest legal tribunal are different from the laws as interpreted by the Federal courts upon the same question, or that the laws as enforced by the state are erroneously adverse to insurance companies.

Petitioner fruther answered that the respondent had an adequate and complete remedy at law by setting up in the suit brought in the state court, all of the alleged facts set out in the amended and supplemental bill; that the Circuit Court of the United States should not take jurisdiction in the matter, and further denied that the respondent wes entitled to any relief under its amended and supplemental bill.

To this answer a replication was filed and the cause referred to William M. Booth, as master in chancery, to take proofs and report the same.

Seventh. That on the 5th day of October, 1900, said master in chancery filed his report in said cause, together with objections thereto made by petitioner, in the Circuit Court, by which the facts set out in the answer were

practically found true. The objections filed by petitioner were ordered to stand as exceptions in the Circuit Court, and after hearing of the same had before the Hon. Christian C. Kohlsaat on the 21st day of December, 1900, a decree was entered, confirming the master's report in part, and finding affirmatively that at the time of the delivery of the policy by the agent of the respondent to Lord, he, Lord, in good faith and without any intent to defraud the respondent, or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, and that no further statement was made in regard to the condition of said Cable, nor were any further inquiries made by respondent's agent in regard thereto.

The court found that the procurement of the policy was a constructive fraud, but that no actual fraud was intended or practiced in the delivery of the policy and the cancellation of the policy was decreed.

Eighth. Your petitioner further shows that thereafter on the 31st day of October, 1900, an appeal in said cause was duly allowed and issued from the Circuit Court of Appeals for the Seventh Circuit upon the petition of your petitioner, and it was ordered that a certified transcript of the record and all proceedings in said cause be forthwith transmitted to said United States Court of Appeals, and that afterwards on the 11th day of January, 1901, a certified transcript of the record and of all proceedings of said court in said cause was filed in the United States Circuit Court of Appeals for the Seventh Circuit and said cause was entered and admitted in said court of Appeals and entitled Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appellant, *vs.* The United

States Life Insurance Company in the City of New York, appellee, No. 762; that the assignment of errors filed on behalf of your petitioner set out, among other errors in said record, the following:

(1) The Circuit Court erred in entering a decree ordering cancellation of the policy of insurance issued to the insured;

(5) The Circuit Court erred in holding that the appellee did not waive the provisions of the policy as to its delivery during the sound health and insurable condition of the insured.

(6) The Circuit Court erred in holding and adjudging that the information given it at the time of the delivery of the policy that the insured had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, without giving further details as to the nature and character of the illness, was a constructive fraud, which vitiated the policy, notwithstanding that no further inquiry was made by appellee as to the nature or character of such illness.

(7) The Circuit Court erred in not dismissing the amended and supplemental bill of complaint and remitting appellee to make its defense in the action at law brought by appellant against appellee in the state court.

Eleventh. That said cause came on to be heard in said Circuit Court of Appeals on the 11th day of April, 1901, before the Hon. William A. Woods, United States Circuit Judge for the Seventh Circuit, Hon. John G. Jenkins, United States Circuit Judge for the Seventh Circuit, and the Hon. Peter S. Grosscup, United States Circuit Judge for the Seventh Circuit, and was duly tried in said court, and on the 2d day of October, 1901, the court rendered

final judgment affirming the said decree in said Circuit Court entered in said cause as aforesaid, and that the Hon. John G. Jenkins, Circuit Judge, in delivering the opinion of said court in affirming said decree, said:

"On February 21, 1899, Cable had tentatively declined to accept the policy, deciding to be guided in his judgment by the action of his intimate friend Lord, who had made a like application upon his own life to the same company. The policy was thereupon returned by McCabe to Finney, the broker from whom he received it. The policy on Lord's life was on the same day left with him, and he was requested to send a check for the premium. Six days afterwards, and on the 27th of that month, McCabe called upon Lord and asked for the payment of the premium upon his policy. Lord asked him if he had the Cable policy, to which McCabe answered 'No,' but that he could get it in a few minutes; whereupon Lord told him to get it, and that he (Lord) would pay him the amount of both premiums. McCabe procured the Cable policy, returned with it to Lord's office, and handed it to the latter, saying as he did so, 'Cable is all right, isn't he?' Here occurs somewhat of a conflict in the evidence. McCabe says that Lord, in a very low voice, without looking at him and in a casual manner, answered, 'The same as he has been for forty-eight hours;' conveying to McCabe's mind the meaning that Cable was all right. Lord says that he answered: 'No; Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours.' The master and the court below found the fact to be as stated by Lord, and, while there is much in the testimony throwing doubt upon the correctness of this conclusion, we are content to take the fact as found by the master and adopted by the court."

That a certified copy of the entire records of said cause in said Circuit Court of Appeals is herewith furnished, marked "Exhibit A" and made a part hereof.

Ninth. Your petitioner is further advised and believes that the judgment of the United States Circuit Court of Appeals in said cause rendered on the 2d day of January,

1900, reversing the decree of the United States Circuit Court dismissing said amended and supplemental bill, and the said decree of the United States Circuit Court entered on the 21st day of December, 1900, and the said judgment of the United States Circuit Court of Appeals, affirming the said last mentioned decree, are erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination under and in conformity with the provisions of the statute in that behalf made and provided.

Tenth. Your petitioner is further advised and believes that the said United States Circuit Court of Appeals in its judgment rendered on the 2d day of January, 1900, erred in ruling that the demurrer filed by the petitioner to the amended and supplemental bill of complaint should have been overruled by the United States Circuit Court and that the said decree dismissing the amended and supplemental bill should be reversed and the cause remanded for further proceedings; that the said United States Circuit Court of Appeals erred in holding that the respondent under the constitution had the right to file its bill in equity in the United States Court to cancel an insurance policy after the death of the insured and suit had been brought upon the policy against respondent in the state court; that said Circuit Court of Appeals erred in ruling that respondent did not have an adequate remedy at law by making its defense in the suit brought against it by petitioner in the state court; that said Circuit Court of Appeals erred in ruling that respondent had the right to file its bill in equity in the United States Courts to cancel the policy of insurance, notwithstanding it could make its defense to the suit at law pending in the state court by setting up all the matters and facts alleged in the bill; that

said Circuit Court of Appeals erred in ruling that the statute of Illinois, by requiring respondent to bind itself not to remove a suit at law brought against it, as a condition precedent to secure a license to do business in the State of Illinois, and further providing for the revocation of its license to do business, should it so remove such suit, was so burdensome, as to enable respondent to apply in equity to the United States Circuit Court to cancel the policy of insurance sued on in the state court; that said Circuit Court of Appeals erred in ruling that a bill in equity would lie to cancel an insurance policy after loss, although suit at law was then pending thereon, because the prosecution of such suit was within the control and discretion of the opposite party.

Eleventh. Your petitioner is further informed and believes that the said United States Circuit Court on said second appeal erred in holding the information conveyed by Lord to respondent's agent at the time of the delivery of the policy that Cable had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, without any further inquiry being made by respondent's agent, was a constructive fraud which vitiated the policy; that said court erred in entering a decree ordering a cancellation of the policy of insurance.

Twelfth. Your petitioner is further informed and believes that the said United States Court of Appeals for the Seventh Circuit in affirming the decree of said United States Circuit Court cancelling said policy of insurance, erred in ruling that the delivery of said policy was procured by fraud in that the respondent was not sufficiently advised of the serious condition of the insured at the time of the delivery of the policy; that said Circuit Court of Appeals erred in holding that the information given to Me-

Cabe by George S. Lord at the time of the delivery of the policy and payment of the premium that Cable had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, was not sufficient notice of the illness of Cable and a waiver by respondent of the condition of its policy requiring a delivery of the same during the sound health and insurable condition of Cable.

Thirteenth. Your petitioner further shows unto your Honors that two questions of special importance arise upon this record which should be authoritatively and finally adjudged by this Honorable Court upon a full presentation to this court of the matters involved.

1st. The fundamental question of the right of a foreign insurance company to bring a suit in equity in the United States Courts to cancel a policy of insurance issued by it after loss has occurred upon the policy and after suit has been brought upon the policy in a state court, where the statute of the state forbids a removal of such action at law to the Federal court under penalty of forfeiture of the license of the insurance company to do further business in the state.

2d. The important questions of substantive law as to whether notification to an insurance company of the illness of an applicant for insurance at the time of the delivery of the policy and payment of the premium is a waiver by the company of the provision in its policy requiring its delivery to be made only during the sound health and insurable condition of the applicant. Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said court

to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said cause, therein entitled "Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appellant, *vs.* United States Life Insurance Company in the City of New York, appellee" No. 762, to the end that the said cause may be reviewed and determined by this court pursuant to the provision of the statute in such case made and provided, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem proper, and that the said judgments of said Circuit Court of Appeals for the Seventh Circuit and the decree of the said Circuit Court for the Northern District of Illinois, Northern Division, entered on the 21st day of December, 1900, and each and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

ALICE A. CABLE,
Administratrix of the estate of Herman D. Cable, deceased.

By H. H. C. MILLER and
W. S. OPPENHEIM,
Her Solicitors.

State of Illinois, } ss.
Cook County. }

William S. Oppenheim, being first duly sworn, says that he is one of the solicitors and of counsel for Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, the petitioner above named, and as such had personal charge of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, and in the United States Circuit Court of Appeals for the Seventh Circuit; that he has read said petition by him subscribed and that the allegations therein contained are true of his own personal knowledge, except such allegations as are stated to be upon information and belief, and that as to these he believes them to be true.

. . . . . .

Subscribed and sworn to before me this . . . . . day of February, A. D. 1902.

. . . . . .

Notary Public.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

STATEMENT.

This is a suit in equity brought by the respondent against the petitioner to cancel a policy of insurance issued by the respondent upon the life of Herman D. Cable. Prior to the time of the filing of the bill herein, a suit at law had been instituted by the petitioner against the respondent in the Superior Court of Cook County, Illinois, upon the policy sought to be cancelled. An amended and supplemental bill was subsequently filed by the petitioner and upon demurrer it was dismissed in the Circuit Court by Judge Kohlsaat. (Pr. Rec. XXXVII.) The decision of Judge Kohlsaat was based upon the authority of *Phœnix Life Insurance Co.* v. *Bailey*, 13 Wall., 616. The decree

dismissing the bill upon appeal was reversed by the Circuit Court of Appeals, with directions to overrule the demurrer to the bill. The Court of Appeals in its opinion practically holds that the respondent, by agreeing with the State of Illinois not to remove any cause brought against it in the state courts to the United States Court, thereby obtained the right to file its bill in equity in the Federal court to cancel a life insurance policy after loss had occurred and suit been brought on the policy in the state court. That the constitution gave respondent the right to have its cause tried in the Federal court, and inasmuch as the agreement under which it obtained its license from the state was so burdensome in the event of the removal of a suit brought in the state court to the Federal court, the Federal court would take charge of the litigation on its equity side, notwithstanding the matters set out in the bill of complaint could be set up in the state court as a defense to the action of the policy. A further ground was given that the action at law was under the control of the petitioner. (Pr. Rec., XXXVIII–XLVII.)

Upon filing the mandate of the Circuit Court of Appeals, the cause was redocketed in the Circuit Court and an answer filed by petitioner denying the various charges of fraud made in the bill of complaint and asserting that the court should not take jurisdiction of the cause, for the reason that respondent had a full and adequate remedy at law by setting up the matters urged in the bill, as a defense to the action in state court. (Pr. Rec., 26–31.)

A reference of the cause was had by William M. Booth master in chancery, who made a finding of facts. (Pr. Rec., 34–44.) The master's report practically finds the allegations of the answer to be true, except as to the nature of the information which had been conveyed to the

agent of respondent at the time of the delivery of the policy, and payment of the premium. The policy had been tendered Mr. Cable on the 21st day of February, 1899, and declined by him at that time, he stating that he did not have time to look into the matter, but would be guided a good deal by what Mr. Lord said and did.

On February 24th, Mr. Cable fell ill of pneumonia, and on the 27th day of February, 1899, the agent called upon Mr. Lord, who asked him if he had Mr. Cable's policy with him, and upon his reply that he had not, he was told to get it and that he, Lord, would pay the amount of the premium on his policy, as well as that of Mr. Cable. McCabe got the policy and handed it to Mr. Lord, saying as he did so: "Is Mr. Cable all right?" and Mr. Lord responded "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." (Pr. Rec., 37.) The master concluded from this statement that while it was substantially true it was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it. (Pr. Rec., 39.)

The court sustained an exception to this finding of the master and affirmatively found that at the time Lord was asked by McCabe as to the then condition of Cable, he in good faith, and without any intention to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, and that Lord made no further statement in regard to the condition of Cable, nor were any further inquiries made by McCabe in regard thereto, and concluded therefrom that the policy was procured on behalf of the deceased by constructive fraud, but that no actual fraud

was intended or practiced in the delivery of the same. Thereupon a decree was entered adjudging the policy void and directing it cancellation. (Pr. Rec., 148, 149.)

On October 1, 1901, the Circuit Court of Appeals affirmed this last decree entered by the Circuit Court. The finding of facts as made by the Circuit Court was adopted by the Circuit Court of Appeals. (Pr. Rec., 178.) The case was heard before Judges Woods, Jenkins and Grosscup. Prior to the time of the rendering of the opinion, Judge Woods had departed this life, but it is stated that he concurred in the conclusions reached. Judge Grosscup states that he concurs in the opinion, the jurisdictional question having been settled upon the former appeal. (Pr. Rec., 180.)

It was attempted at the last hearing to have the court re-consider its former opinion upon the jurisdictional question, but this it declined to do. The affirmance of the decree is based upon the ground that the information which was given by Lord to McCabe at the time of the delivery of the policy, was not sufficient to put the petitioner upon notice as to the then condition of Cable.

BRIEF AND ARGUMENT.

I.

Where a suit at law is brought against an insurance Company for a loss sustained under an Insuance policy a court of chancery has no jurisdiction to cancel the policy, since every ground set forth in the bill of complaint can be set up and tried as a defense in the action at law.

Phœnix Life Ins. Co. v. *Bailey*, 13 Wallace, 616.
Ætna Life Ins. Co. v. *Smith*, 73 Fed., 318.
Home Ins. Co. v. *Stanchfield*, 1 Dill., 424.
Revised Statutes of the United States, Sec. 723.

A foreign insurance company has no right to do business in a state without license and all contracts entered into by it are controlled by the statutes of the state.

New York Life Ins. Co. v. *Cravens*, 178 U. S., 389.

The respondent procured its license to do business in the State of Illinois upon filing its express written agreement that no suits at law which might be brought against it in the courts of this state should be removed to the courts of the United States, and if it did cause such a removal, its further right to do business in the State of Illinois should be revoked. The statute does not forbid a removal to the Federal courts of a suit brought against it in the state court, but reserves the right to revoke the license issued under this written agreement, if the

insurance company does not submit its controversies to the judgment of the state courts, and stand upon the same footing as domestic companies. The statute under which this contract is made is constitutional and the agreement valid and binding.

Doyle v. *Continental Ins. Co.*, 94 U. S., 535.

The Court of Appeals holds that by securing its license under this statute, the respondent has the right to apply to the chancery side of the Federal court in the first instance and deprive the beneficiary in the policy of the right of trial by jury guaranteed to her by the Constitution of the United States. The first reason given for this is that the complainant "being a citizen of New York and the defendant a citizen of Ilinois, plaintiff (complainant) under the constitution has the right to come to the Federal court for an adjudication. For a person entitled to litigate in the Federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights."

This reasoning is unsound, because the respondent had the right to remove the cause brought against it to the Federal court if it saw fit. It is true that it procured its license to do business in the state upon the agreement that it would not remove such a cause and that if it did so, its further right to do business in the state might be revoked. But there is no provision in the statute or its contract, which forbids the removal. It can do so at its option. Nor can any moral ground be urged against the respondent having its causes tried in the same court as that of domestic insurance companies in the State of Illinois.

The attempt to distinguish the case at bar from that of

Phoenix Life Ins. Co. v. *Bailey, supra,* is without justification. The only claimed difference is that the Bailey case at law was pending in the courts of the District of Columbia, while the present one was brought in the state court of Illinois. Without this alleged distinction, it must be conceded that the decision of the Circuit Court of Appeals is directly opposed to the opinion of this court in the Bailey case.

In taking jurisdiction of this cause, did not the Circuit Court of Appeals err and enable the respondent to perpetrate a fraud upon the People of the State of Illinois, and, with impunity, to violate its express agreement under which it was permitted to do business in the state and still retain all the benefits of its contract? It could not do business within the limits of the state without first securing its license under this written agreement. The agreement was one the state had the right to exact, and is legally binding.

The respondent refrains from removing the suit brought against it in the state court, but violates the spirit and essence of its agreement by appealing to the chancery side of the Federal court, alleging that it made this contract and if it violates its terms will be denied the right to further carry on its business in the State of Illinois. Upon this ground it asks a court of equity to relieve it from a binding agreement, fairly entered into, and, at the same time, deprive a person having a claim against it for a loss under a policy, from having her action tried by a law court, which otherwise would have exclusive cognizance of the suit. And what is the answer given by the Court of Appeals to this most remarkable request?

"It is true you entered into a legal contract not to remove suits brought against you in the state courts to the

Federal courts, and this was done as a condition precedent to procuring a license without which you could not do business in the state. Your agreement is lawful and binding. While you have the right to remove the cause brought against you to the Federal court, such action being in contravention of your agreement, will likely result in a revocation of your license. You desire to obtain all the benefits of your contract, but avoid its burdens. Not only this but more will be done for you; we will give you the right to have your case tried in the Federal court and because of this contract, have the same tried in equity denying your opponent his constitutional right to a trial by jury. If you fail to maintain your bill in equity, your adversary may then bring her suit at law against you, which could have been done in the first instance had you not entered into this lawful agreement with the state to try your cause with her in the state tribunal."

II.

The second reason given by the Circuit Court of Appeals for a reversal of the decree dismissing the bill, is "the remedy open to the plaintiff (complainant) is one not under its own control, but in the control and discretion of the opposite party." If this is a basis of equity jurisdiction then every suit at law, whether brought in the Federal or state courts, can be enjoined, and no action at law can be maintained if the defendant desire to bring his bill in equity concerning the matters complained of, against him. The proposition seems so unsound and without merit that its simple statement is its own refutation.

III.

Suit was brought by petitioner against the respondent in the state court and summons issued prior to the filing of the bill of complaint. (Pr. Rec., 50.) This gave the

state court exclusive jurisdiction over the subject-matter, and the Federal court could not subsequently enjoin or oust the state court of its rightful jurisdiction.

Farmers Loan & Trust Co. v. *Lake Street Elevated R. R. Co.*, 177 U. S., 51.

IV.

The Circuit Court found at the time the policy was delivered that the agent of respondent, in reply to a question as to whether Mr. Cable was all right, was informed: "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." It was further held that this statement was made in good faith and without any intent to defraud respondent or conceal the real condition of the health of Cable, and that no further inquiries were made in regard to Cable's health. (Pr. Rec., 148.) This finding of fact, while approved by the Court of Appeals, is said to have not been a full disclosure of the condition of Mr. Cable's health, and, therefore, a constructive fraud upon the respondent, such as to vitiate the policy. At the time of the making of this statement, it was the belief of the person receiving the policy and of the family and physician of Mr. Cable that he would recover from his then illness. (Pr. Rec., 29.)

We respectfully submit that the disclosure made by Mr. Lord to the agent of respondent was sufficient to put him upon guard and ample notice to the company of the then condition of Mr. Cable's health and that the delivery of the policy with such knowledge was a waiver of its provision concerning the delivery of the same during the good health of the insured.

Phœnix Life Insurance Co. v. *Raddin*, 120 U. S., 183.

Marston v. *Kennebec Ins. Co.*, 89 Me., 266.

German American Ins. Co. v. *Morris*, 100 Ky., 29.

Joyce on Ins., Sec. 1870.

Manhattan Life Ins. Co. v. *J. P. Willis & Bro.*, 60 Fed., 236.

V.

The decision of the Court of Appeals, reversing the decree of Judge Kohlsaat, dismissing the bill, is one that has caused much adverse comment and it is evident that Judge Grosscup, in concurring in the last opinion of the Court of Appeals, was of the opinion that the first decision was not sound. If adhered to it gives foreign insurance companies in almost all of the states of the Union, rights possessed by no other citizens. By entering into a valid contract with a state in order to procure its license, to do business therein, it thereby becomes enabled to apply to the chancery side of the Federal court in every case where more than $2,000 is involved and to deny the insured or beneficiary the right of a trial by jury, as guaranteed under the Constitution of the United States. Should the chancellor hold adversely to the insurance company no relief is awarded to the injured party. He must then seek a court of law, and bring his suit upon the common law side of the court and again litigate with the insurance company his rights against it. Had the state not passed such a statute and the insurance company not entered into the agreement, no one could urge that the insurance company could apply to a court of equity to cancel the policy after loss.

We respectfully submit that the courts of the state are able to do justice between the parties, and when the respondent obtained its license to do business in the state upon the express agreement that it would submit its controversies to the courts of the state and no longer do business therein should it decline to do so, a Federal Court of Chancery should not step in and deprive a party suing the insurance company in a state court of his right to a trial by jury, because the insurance company had entered into a valid contract with the authorities of the state not to remove such cause to the Federal court.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for Petitioner.

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THE

Brief

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

STATEMENT OF THE CASE.

On January 16, 1899, Herman D. Cable made an application in writing to the United States Life Insurance Company, through one James F. McCabe, for insurance on his life in the sum of $50,000, which application was forwarded to the New York office of the insurance company, and on the 6th day of February, 1899, a policy was issued upon the life of said Cable in the sum of $50,000, payable in thirty consecutive annual instalments of $1,666.66 each, or a commuted value of $30,000, to the estate of said Cable. The written application which, by its terms, was made a part of the policy, was signed by said Cable, and contained the following provision:

"It is hereby declared and agreed * * * that the policy to be issued hereon shall take effect only upon the payment of the first premium and delivery of the policy during my lifetime, sound health and insurable condition."

George S. Lord, who was a neighbor and friend of Cable, and interested with him in numerous business transactions, at the same time made a like application to the insurance company and a policy was also issued to him and both were forwarded from the New York office of the insurance company to its Chicago office and were received at the latter office on the 20th day of February, 1899. The policies were then turned over by the general agent of the insurance company in Chicago, to one T. J. Finney. Finney was a life insurance broker not regularly employed by any insurance company, but he had done business with the United States Life Insurance Company through its Chicago general agent for a number of years and had procured insurance on the life of Cable in another company, which had lapsed in November, 1898. James F. McCabe was also an insurance agent or broker and was requested, through Finney, to obtain applications for the United States Life Insurance Company. He, however, was not personally known to the Chicago general agent. Upon the delivery of the two policies to Finney, the gross amounts of the premiums were charged against him by the respondent's general agent and he subsequently paid to such general agent the amount due on such premiums. The applications of both Cable and Lord were obtained from them by McCabe under an agreement between him and Finney, and when procured were delivered to Finney. When Finney received the policies he in turn delivered them to McCabe on February 21, 1899. Thereupon McCabe called at the office of Cable, having both policies

with him, but Cable declined to accept his policy at that time, stating that he did not have time to look into the matter, but would be guided a good deal by what Lord said and did. Afterwards, on the same day, McCabe called at Lord's office, found him very busy, and left his policy, together with the financial statement of the company, and told him that he, Lord, might send a check for the premium. On the same day the Cable policy was returned to Finney. McCabe then went out of town and returned on the 27th of February, 1899, and going to Lord's office asked for the payment of the premium on his policy. Mr. Lord thereupon asked McCabe if he had also the Cable policy. McCabe responded that he had not, but would get it in a few minutes. McCabe then went to Finney's office, procured the Cable policy and returned with it to Mr. Lord's office. On handing it to Mr. Lord he said: "Is Mr. Cable all right?" Lord answered, "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." Thereupon McCabe delivered both of the policies and received payment of the premiums. Mr. Lord then took the Cable policy and delivered it to a member of Mr. Cable's family on the evening of the same day. Mr. Lord had been authorized in advance by Mr. Cable to accept and pay for the latter's policy and the premium advanced by Mr. Lord was subsequently repaid him.

On February 21, 1899, when the policy was first presented to Mr. Cable, he was in sound health, but on the 24th of February he was taken ill with incipient pneumonia and was attended by a physician in the evening of that day and put under the care of a trained nurse. His disease developed into a case of acute pneumonia. He was

confined to his bed from the evening of February 24th until March 2, 1899, when he died.

Mr. Lord was aware of the illness of Cable at the time he received the policy and paid the premium, but the attending physician had informed the family that he expected Mr. Cable would recover from his illness and Mr. Lord, knowing this fact in good faith, and without any attempt to defraud or conceal the real condition of the health of the said Cable, made the statement above quoted prior to the time of the delivery of the policy and payment of the premium as above stated to McCabe, and McCabe made no further inquiries in regard to the condition or illness of Mr. Cable. Mr. Cable died on the 2nd of March, 1899, of heart failure, which was the result of his illness. Until the evening prior to his death his physician confidently expected Mr. Cable's recovery. After the death of Mr. Cable the insurance company tendered a return of the premium received by it, and demanded the surrender of the policy, which was refused. Proofs of death were filed with the insurance company and on May 11, 1899, petitioner, who had been appointed administratrix of the estate of Herman D. Cable, brought suit in the Superior Court of Cook County, Illinois, for the commuted value of the insurance policy, being the gross sum of $30,000. The action was begun by the filing of a præcipe and the issuance of a summons, which was placed in the hands of the sheriff of Cook County, Illinois, for service. About an hour later the insurance company filed its bill of complaint in the Circuit Court of the United States, asking for a cancellation of the policy and an order enjoining the petitioner from prosecuting her suit in the State Court. The bill of complaint alleged that at the time

of the delivery of the policy on the 27th day of February, 1899, the life of Cable had been despaired of; that Lord obtained a delivery of the policy with full knowledge of the dangerous illness of Cable and the stipulation in the policy that it should take effect only upon prompt payment of the first premium and its delivery during the sound health and insurable condition of Mr. Cable; that the insurance company had no knowledge of the illness of Cable, but such fact was purposely and wilfully concealed from it, and that Lord was not authorized to receive the policy or pay the premium thereon, but such payment was made out of his own funds, without the knowledge and consent of Cable and that a deliberate fraud was practiced in the procurement of the delivery of the policy.

A general and special demurrer was filed to the bill of complaint. Leave was subsequently obtained to file an amended and supplemental bill, which made practically the same allegations as the original, but set up the bringing of the suit in the State Court. The demurrer filed to the original bill was ordered to stand as a demurrer to the amended and supplemental bill.

Upon argument of the demurrer before Judge Kohlsaat, the amended and supplemental bill was dismissed for want of equity. (Pr. Rec., 24.)

The decision of Judge Kohlsaat was based upon the authority of *Phoenix Life Insurance Co.* v. *Bailey*, 13 Wall., 616. The decree dismissing the bill upon appeal was reversed by the Circuit Court of Appeals, with directions to overrule the demurrer to the bill. The Court of Appeals in its opinion practically held that the respondent, by agreeing with the State of Illinois not to remove any cause brought against it in the state courts to the United States

Court, thereby obtained the right to file its bill in equity in the Federal Court to cancel a life insurance policy after loss had occurred and suit been brought on the policy in the state court, and that the constitution gave respondent the right to have its cause tried in the Federal Court, and inasmuch as the agreement under which it obtained its license from the state was so burdensome in the event of the removal of a suit brought in the state court to the Federal Court, the Federal Court would take charge of the litigation on its equity side, notwithstanding the matters set out in the bill of complaint could be set up in the state court as a defense to the action on the policy. A further ground was given that the action at law was under the control of the petitioner.

United States Life Insurance Co. v. *Cable,* 98 Fed. R., 761.

Upon filing the mandate of the Circuit Court of Appeals, the cause was redocketed in the Circuit Court and an answer filed by petitioner denying the various charges of fraud made in the bill of complaint and asserting that the court should not take jurisdiction of the cause, for the reason that respondent had a full and adequate remedy at law by setting up the matters urged in the bill, as a defense to the action in the state court. (Pr. Rec., 26-31.)

A reference of the cause was had to William M. Booth, a master in chancery, who made a finding of facts. (Pr. Rec., 34-44.) The master's report practically finds the allegations of the answer to be true, except as to the nature of the information which had been conveyed to the agent of respondent at the time of the delivery of the policy, and payment of the premium. The policy had been tendered Mr. Cable on the 21st day of February, 1899, and declined

by him at that time, he stating that he did not have time to look into the matter, but would be guided a good deal by what Mr. Lord said and did.

On February 24th Mr. Cable fell ill of pneumonia, and on the 27th day of February, 1899, the agent called upon Mr. Lord, who asked him if he had Mr. Cable's policy with him, and upon his reply that he had not, he was told to get it, and that he, Lord, would pay the amount of the premium on his policy, as well as that of Mr. Cable. McCabe got the policy and handed it to Mr. Lord, saying as he did so: "Is Mr. Cable all right?" and Mr. Lord responded, "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." (Pr. Rec., 37.) The master concluded from this statement that while it was substantially true, it was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it. (Pr. Rec., 39.)

The court sustained an exception to this finding of the master and affirmatively found that at the time Lord was asked by McCabe as to the then condition of Cable, he in good faith, and without any intention to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, and that Lord made no further statement in regard to the condition of Cable, nor were any further inquiries made by McCabe in regard thereto, and concluded therefrom that the policy was procured on behalf of the deceased by constructive fraud, but that no actual fraud was intended or practiced in the delivery of the same. Thereupon a decree was entered adjudging the policy void and directing its cancellation. (Pr. Rec., 148, 149.)

On October 1, 1901, the Circuit Court of Appeals affirmed this last decree entered by the Circuit Court. The case was heard before Judges Woods, Jenkins and Grosscup. Prior to the time of the rendering of the opinion, Judge Woods had departed this life, but it is stated that he concurred in the conclusions reached. Judge Grosscup concurs in the opinion, the jurisdictional question having been settled upon the former appeal. (Pr. Rec., 180.)

It was attempted at the last hearing to have the court reconsider its former opinion upon the jurisdictional question, but this it declined to do. The affirmance of the decree is based upon the ground that the information which was given by Lord to McCabe at the time of the delivery of the policy, was not sufficient to put the respondent upon notice as to the then condition of Cable.

Errors Relied Upon.

1. The Circuit Court of Appeals erred in reversing the decree of the Circuit Court dismissing the amended and supplemental bill and directing the Circuit Court to overrule the demurrer thereto.

2. The Circuit Court erred in overruling the demurrer of petitioner to the amended and supplemental bill of complaint.

3. The Circuit Court erred in ordering the cancellation of the policy of insurance issued to the insured.

4. The Circuit Court erred in holding and adjudging the information given at the time of the delivery of the policy, that the insured had been sick for two or three days, but was no worse than he had been for the last forty-

eight hours, without giving further details as to the nature and character of such illness, was a constructive fraud which vitiated the policy, notwithstanding no further inquiry was made as to the nature or character of the illness.

5. The Circuit Court erred in not dismissing the amended and supplemental bill of complaint and remitting the respondent to make its defense to the action at law brought against it in the state court.

6. The Circuit Court erred in not entering a decree in favor of the petitioner against respondent directing the payment of the sum of thirty thousand ($30,000) dollars, as provided by the policy of insurance.

7. The Circuit Court of Appeals erred in affirming the decree of the Circuit Court directing a cancellation of the policy of insurance.

BRIEF AND ARGUMENT.

I.

WHERE A SUIT AT LAW IS BROUGHT AGAINST AN INSURANCE COMPANY FOR A LOSS SUSTAINED UNDER AN INSURANCE POLICY, A COURT OF CHANCERY HAS NO JURISDICTION TO CANCEL THE POLICY, SINCE EVERY GROUND SET FORTH IN THE BILL OF COMPLAINT CAN BE SET UP AND TRIED AS A DEFENSE IN THE ACTION AT LAW.

To briefly summarize the cause of action set out in the respondent's amended and supplemental bill of complaint: it is an attempt to secure a decree cancelling a policy of insurance after the death of the assured and the rights of the beneficiary had matured, and also to secure an injunction against the beneficiary from prosecuting an action in the courts of the State of Illinois, which had been brought by her upon the insurance policy prior to the filing of the bill of complaint.

The assumed ground for interference upon the part of the Federal Court alleged in the bill is, first, that the law of the State of Illinois forbids respondent from removing the case instituted against it in the state court to the Federal Court, and should it do so, its license to further do business in the State of Illinois would be revoked; second, the courts of the United States recognize a different rule of law from that enforced in the state courts and that if the cause is tried in the state court under the laws as there administered, judgment will be had against the respondent for the value of the policy, while under the holdings of the Federal Courts the respondent would be relieved from all liability thereunder.

Judge Kohlsaat, sitting in the Circuit Court, upon demurrer entered a decree dismissing the bill upon the ground that respondent had a full, adequate and complete remedy by setting up its defense to the action at law which had been brought against it in the Superior Court of Cook County, Illinois. Upon appeal by the respondent to the Circuit Court of Appeals for the Seventh Circuit, this decree was reversed and the reason given therefor was that the respondent, being a citizen of the State of New York, had under the Constitution of the United States the right to come into a Federal Court for adjudication, and as it was forbidden by the laws of the state which had licensed it to do business therein to remove the cause brought against it under penalty of forfeiting its right to do further business in the state, that such a provision was so onerous as to practically deny this right to remove the cause and the Federal Court, on its chancery side, would take jurisdiction, notwithstanding had the action at law been brought in the Federal Court, the chancery suit would not lie.

Section 723 of the Revised Statutes of the United States provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

In *Phoenix Life Insurance Co.* v. *Bailey*, 13 Wall., 616, it is held that a suit in equity will not lie to cancel an insurance policy for fraud in its procurement, *after* the death of the assured. It is there said:

"Fraudulent misrepresentations and the fraudulent suppression of material facts are the principal grounds alleged for the relief prayed in the bill of complaint, and it must be conceded that the proofs introduced by the complainants tend strongly to support the allegations which contain those charges. Those allegations in the bill of complaint are de-

nied in the answer, and the respondent has introduced proofs in support of those denials, but it is not going too far to say that the weight of the evidence as exhibited in the record is adverse to the pretensions of the respondent, nor does it appear that any different views were entertained by the subordinate court. Grant all that, and still it does not follow that the decree in the court below is erroneous, as the bill of complaint may well have been dismissed upon grounds wholly disconnected from the merits of the controversy.

Suits in equity, the Judiciary Act provides, shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the Chancery Court of this district.

Hipp v. *Babin*, 19 How., 271 (60 U. S. XV 633).

Parker v. *W. L. Cotton & Woolen Co.*, 2 Black, 545 (67 U. S. XVII, 333).

Boyce v. *Grundy*, 3 Pet., 210.

Graves v. *Ins. Co.*, 2 Cranch., 444.

1 Stat. at L., 82.

Much consideration was given to the construction of that section of the Judiciary Act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court without hesitation came to the conclusion that he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion, and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant under such circumstances has a right to a trial by jury.

Foley v. *Hill*, 1 Phil., 399; s. c., 2 H. of L. Cas., 28.

Fire Ins. Co. v. *Delavan,* 8 Paige, Ch. R., 422.

Alexander v. *Muirhead,* 2 Desaus, 162; 5 Am. Law Rev., 564.

* * * * *

Jurisdiction may also be exercised by courts of equity to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of the truth, if it appear that the rescission of the same is essential to protect the opposite party from pecuniary injury. Equity will rescind or enjoin such instruments where they operate as a cloud upon the title of the opposite party, or where the instruments are of a character that the vice in the inception of the same would be unavailing as a defense by the injured party if the instruments were transferred for value into the hands of an innocent holder. Title deeds fraudulently procured may, under such circumstances, be decreed to be canceled or reformed, as the case may be, and bills of exchange or promissory notes may be enjoined and practically divested of their negotiable quality.

Such jurisdiction also extends to the protection of letters patent against infringements, and is exercised in many cases to prevent waste, and for many other judicial purposes, but the rule in the Federal Courts is universal that if the defendant has a good defense at law, and the remedy at law is as perfect and complete as the remedy in equity, an injunction will not be granted.

Whether the remedy sought in this case would have been available if the suit had been instituted before the death of the person whose life was insured, it is not necessary to determine, as no such question is involved in the record. Suffice it to say upon that topic that the complainant has not referred the court to any decided case which supports the affirmative even of that inquiry, but the difficulty in the way to such a conclusion in the case before the court is much greater, as by the death of a *cestui que vie* the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the

policies, and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury.

Foley v. *Hill*, 2 H. of L. Cas., 45.
Thrale v. *Ross*, 3 Bro., Ch. 56.
Arundel v. *Holmes*, 4 Beav., 325.
Norris v. *Day*, 4 You. and C., 475.

* * * * *

Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract; but where the cause of action is 'a purely legal demand' and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal Court, as it is clear that the case, under such circumstances, is controlled by the 16th section of the Judiciary Act."

A very similar case to the one at bar is that of *Home Insurance Co.* v. *Stanchfield*, 1 Dill., 424. There a fire insurance policy had been issued and after the loss, it was claimed by the company that it discovered the policy had been secured by fraudulent representations. Before a suit was instituted upon the policy, the insurance company filed its bill in the Federal Court to enjoin the bringing of the suit at law upon the policy. The case came for hearing before Justice Miller and Judge Dillon. Upon the merits, in a very elaborate opinion and after reviewing a large number of authorities, Judge Dillon held that a suit in equity would not lie to enjoin an action upon an insurance policy after loss, for the reason that the insurance company had a complete remedy by making its defense to the action at law. Justice Miller concurred in this opinion and stated that after loss, a bill in equity could not be maintained to cancel the policy.

Under the authority of the Phœnix Life Insurance case, *supra*, a similar bill was dismissed in the Circuit Court of the United States for the Eastern District of North Carolina.

Aetna Life Ins. Co v. *Smith*, 73 Fed., 318.

The Circuit Court of Appeals attempted to distinguish the case at bar from that of the *Phoenix Life Insurance Company* v. *Bailey, supra*, upon the ground that the law action against the Phœnix Life Insurance Company was pending in the courts of the District of Columbia, while here the suit on the policy had been brought in the state court. Without this alleged distinction, it must be conceded that the decision of the Circuit Court of Appeals is directly opposed to the opinion of this court in the Phœnix Life Insurance Company case.

The statutes of the State of Illinois concerning the regulation of business of foreign insurance companies provides that it shall be unlawful for any insurance company to do business in this state until it shall have filed a written application for a license to do business in the state with the auditor of public accounts, and that "it will accept a license therefor according to the laws of this state and that said license shall cease and terminate in case and whenever it shall remove or make application to remove into any United States court any action or proceeding commenced in any of the state courts of this state, upon any claim or cause of action arising out of any business transaction, in fact, done in this state."

The second section provides that upon complying with the requirements of this act a license shall be issued to the insurance company to carry on its business within the State of Illinois.

Section 3 is as follows:

"If any such incorporated company, association or partnership shall remove, or make application to remove, into any United States court any action or proceeding commenced in any state court of this state upon a claim or cause of action arising out of any business, or transaction in fact done in this state, although there may have been a stipulation authorizing such removal, or if it shall violate, or fail to comply with, any of the other requirements or conditions now imposed by existing law, it is hereby made the imperative duty of the auditor of public accounts at once to revoke, cancel and annul the license issued to such incorporated company, association or partnership; and thereafter no such incorporated company, association or partnership shall transact within this state any of the business for which it was incorporated, until again duly licensed. In case such revocation of license shall be made because of the removal of, or the attempt to remove any action from a state court of this state to any United States court, no renewal of such license shall be made within three years after such revocation. Whenever such license shall be revoked, the auditor of public accounts shall give notice of such revocation by mail to the president and secretary of such corporation and shall also cause a notice of the same to be published three times in some weekly newspaper published in the City of Springfield. A certified copy of the order of removal, shall be sufficient evidence of the removal of any cause."

Hurd's R. S. (1899), Chap. 73, Sec. 33.

The respondent complied with the provisions of this act by filing its written application for a license and was regularly authorized to do business within the State of Illinois.

A foreign insurance company has no right to do business in the state without license and contracts entered into by it are controlled by the statutes of the state.

New York Life Ins. Co. v. *Cravens*, 178 U. S., 389.

The statute of the state under which respondent was licensed does not forbid a removal to the Federal Court of suits brought against it in the state court, but simply reserves the right to revoke the license issued under the written agreement given by respondent to the state, if it does not submit its controversies to the judgment of the state courts and stand upon the same footing as domestic companies. This statute is constitutional and the agreement made by the respondent under which it procured its license is valid and binding.

Doyle v. Continental Insurance Company,
94 U. S., 535.

The Circuit Court of Appeals in effect ruled that by securing its license under this statute the respondent had the right to apply to the chancery side of the Federal Court in the first instance and deprive the beneficiary in a policy issued by it of the right to a trial by jury guaranteed by the Constitution of the United States.

The first reason given for this is that the respondent "being a citizen of New York and the defendant a citizen of Illinois, plaintiff under the constitution has the right to come to the Federal Court for an adjudication. For a person entitled to litigate in the Federal Court it has not an adequate remedy at law to be invited into a state court by its antagonist to adjudicate its rights." This reasoning is unsound, because the respondent had the right to remove the action brought against it to the Federal Court if it saw fit and the statute of the state does not attempt to deny such right.

Respondent procured its license to do business in the state upon the agreement that it would not remove such a cause and that if it did so, its further right to do business

in the state might be revoked. But there is no provision in the statute, or its contract, which forbids such a removal. It can do so at its own option, but it is said that if the suit is removed then the state authorities will revoke the license. This may be true, but the insurance company has no right to do business in the State of Illinois, except upon consent of the state authorities. The state has the right at any time, with or without reason, to revoke its license to further carry on its business within the limits of the state. Nor can there be any just reason why a foreign company should not be compelled to have its causes tried in the same courts as do domestic insurance companies. If it be held that the act of the State of Illinois under which respondent obtained its license is unconstitutional, so far as the same refers to the removal of a cause to the United States Courts, then the respondent had a perfect right to wholly disregard the statute and remove the action brought by petitioner to the Federal Court. In such case, should the state authorities attempt to revoke the license of respondent, such action could be enjoined by the Federal Court. An unconstitutional law is no law and it is the same as if no attempt had ever been made to enact such a statute. If placed upon the statute books, it may be disregarded with impunity and ought not to be a pretext whereby the Federal Courts grasp out and seize jurisdiction of cases which they could not possibly have without such an unconstitutional statute.

It is apparent that Judge Grosscup, sitting in the Court of Appeals upon the last hearing of the case in that court, was of the opinion that the first decision rendered by the Circuit Court of Appeals was not sound. The effect of this decision, if adhered to, is to give foreign insurance companies in almost every state of the Union, rights possessed

by no other citizen. By entering into a valid contract with the state to procure its license to do business therein, conditioned that if it removes an action at law brought against it in the state court to the Federal Court, its license to do business within the state may be revoked, it thereby becomes enabled to apply to the chancery side of the Federal Court in every case where more than two thousand dollars ($2,000) is involved and to deny the insured or beneficiary the right of a trial by jury. Should the chancellor hold adversely to the insurance company, no relief is awarded the injured party. He must then seek a court of law and again litigate with the insurance company his rights against it. Had the state not passed such a statute and the insurance company not entered into the agreement, no one could urge that the insurance company could apply to a court of equity to cancel the policy after loss. In taking jurisdiction of this cause, did not the Circuit Court of Appeals err and enable the respondent to perpetrate a fraud upon the people of the State of Illinois and with impunity violate its express agreement under which it was permitted to do business in the state and still retain all the benefits of its contract with the state? It could not do business within the limits of the state without first securing its license under this written agreement. The agreement was one the state had the right to exact and is legally binding.

The respondent refrains from removing the suit brought against it in the state court, but violates the spirit and essence of its agreement by appealing to the chancery side of the Federal Court, alleging that it made this contract, and if it violates its terms will be denied the right to further carry on its business in the State of Illinois. Upon this ground it asks a court of equity to relieve it from a binding agreement, fairly entered into, and, at the same

time, deprive a person having a claim against it for a loss under a policy, from having her action tried by a law court, which otherwise would have exclusive cognizance of the suit. And what is the answer given by the Court of Appeals to this most remarkable request? Substantially this:

It is true you entered into a legal contract not to remove suits brought against you in the state courts to the Federal Courts, and this was done as a condition precedent to procuring a license without which you could not do business in the state. Your agreement is lawful and binding. While you have the right to remove the cause brought against you to the Federal Court, such action being in contravention of your agreement, will likely result in a revocation of your license. You desire to obtain all the benefits of your contract, but avoid its burdens. Not only this, but more will be done for you: we will give you the right to have your case tried in the Federal Court and because of this contract have the same tried in equity denying your opponent her constitutional right to a trial by jury. If you fail to maintain your bill in equity, your adversary may then bring her suit at law against you, which could have been done in the first instance had you not entered into this lawful agreement with the state to try your cause with her in the state tribunal.

II.

THE CIRCUIT COURT OF THE UNITED STATES CANNOT ENJOIN AN ACTION IN THE STATE COURT.

It is set up in the amended and supplemental bill and found by the master that prior to the time of the filing of the bill of complaint an action at law had been instituted

against the respondent in the Superior Court of Cook County, Illinois, a summons issued therein and placed in the hands of the sheriff for service. (Rec., 40.) Under the law of the State of Illinois jurisdiction attaches by the filing of a praecipe and issuance of a summons thereunder.

Collins v. *Manville*, 170 Ill., 614.

Schroeder v. *Merchants & Mechanics Ins. Co.*, 104 Ill., 71.

Farmers Loan & Trust Co. v. *Lake St. Elevated R. R. Co.*, 177 U. S., 51.

Section 720 of the United States Statutes provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of the state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The present action is a direct violation of both the letter and spirit of the statute, nor could it be maintained though such a statute did not exist. The case of *Diggs* v. *Wolcott*, 4 Cranch., 179, is on all fours with the present suit. There a suit at law was brought in a state court upon two promissory notes which defendants claimed had been obtained from them by fraudulent misrepresentations; thereupon the defendants filed a bill in chancery to have the notes cancelled for fraud and to perpetually enjoin the proceedings at law for a recovery thereon. The chancery suit was removed to the Circuit Court of the United States and a decree there entered enjoining the further prosecution of the law action in the state court, and providing for the cancellation of the notes. Upon appeal the cause was reversed by this court, for the reason that the Circuit Court of the United States had no jurisdiction to enjoin proceedings in the state court.

In *Peck* v. *Jenness*, 7 How., 624, Mr. Justice Grier says:

It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity; for, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy* v. *Earl of Cassillis*, 2 Swanst., 313, Lord Eldon, at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved, because it was admitted if the court of chancery could in that way restrain proceedings in a foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court."

* * * "In the case of *Diggs* v. *Wolcott* (4 Cranch., 119) the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a state court, and this court reversed the decree, because it had no jurisdiction to enjoin proceedings in a state court."

To the same effect is:

Riggs v. *Johnson Co.*, 6 Wall., 195.

Orton v. *Smith*, 18 How., 265.

Haines **v.** ***Carpenter***, 91 U. S., 267.

In re Sawyer, 124 U. S., 219.

Farmers Loan & Trust Co. v. *Lake Street Elevated R. R. Co., supra.*

Prior to the bringing of the present suit, the Superior Court of Illinois had jurisdiction over the controversy which respondent seeks to have adjudicated in the Federal Court. Whether this proceeding is stayed by the issuance of an injunction or by decreeing the policy of insurance held by petitioner to be canceled, the result is the same. The effect of the action of the Federal Court is to deprive the state court of the power to adjudicate upon the matters submitted to it. The Federal Court and the state court are sitting in the same jurisdiction. To hold that the Federal Court in such a case may annul the proceedings in the state court or deprive that court of its right to pass upon petitioner's rights, is in direct violation of the rule of comity which has always existed between courts and might result in an unseemly scramble between the parties as to which court would first render a decree or judgment in the matter. It also would probably result in a collision between the powers of the two courts in the event that one would decline or refuse to acknowledge the supremacy of the other.

III.

THE DISCLOSURE MADE WAS SUFFICIENT NOTICE OF CABLE'S ILLNESSS.

The Circuit Court found that at the time the policy was delivered the agent of respondent, in reply to a question as to whether Mr. Cable was all right, was informed: "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." It was further held that this statement was made in good faith and without any intent to defraud respondent or conceal the real condition of the health of Cable, and that no

further inquiries were made in regard to Cable's health. (Pr. Rec., 148.) This finding of fact, while approved by the Court of Appeals, is said to have not been a full disclosure of the condition of Mr. Cable's health, and, therefore, a constructive fraud upon the respondent, such as to vitiate the policy. At the time of the making of this statement, it was the belief of the person receiving the policy and of the family and physician of Mr. Cable that he would recover from his then illness. (Pr. Rec., 29.)

We respectfully submit that the disclosure made by Mr. Lord to the agent of respondent was sufficient to put him upon guard and ample notice to the company of the then condition of Mr. Cable's health and that the delivery of the policy with such knowledge was a waiver of its provision concerning the delivery of the same during the good health of the insured.

Phoenix Life Insurance Co. v. *Raddin,* 120 U. S., 183.

Marston v. *Kennebec Ins. Co.,* 89 Me., 266.

German American Ins. Co. v. *Morris,* 100 Ky., 29.

Joyce on Ins., Sec. 1870.

Manhattan Life Ins. Co. v. *J. P. Willis & Bro.,* 60 Fed., 236.

IV.

UNDER THE FACTS THE REMEDY AT LAW OF RESPONDENT IS COMPLETE AND ADEQUATE.

The effect of a decree in the present case would not necessarily be a final adjudication as to the rights of the parties, should there be a dismissal of the bill. Every

defense had by the Insurance Company can be made in the suit brought in the state court. The question then arises whether such a clear and uncontroverted case of fraud has been made as will authorize the court to sustain the bill.

"The burden of proof is on the complainant, and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character, the complainant must show by clear and decisive proof:

First. That the defendant has made a representation in regard to material *fact.*

Second. That such representation was false.

Third. That such representation was not actually believed by the defendant, on reasonable grounds, to be true.

Fourth. That it was made with intent that it should be acted on.

Fifth. That it was acted on by complainant to his damage; and

Sixth. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

Southern Development Co. v. *Silva,* 125 U. S., 247.

Farnsworth v. *Duffner,* 142 U. S., 207.

Atlantic Delane Co. v. *James,* 94 U. S., 207.

Morse Arms Mfg. Co. v. *Winchester Repeating Arms Co.,* 33 Fed., 184.

In this last case a cross-bill was filed seeking to cancel a note for fraud, and the court held that as there was doubt about the question, the cross-bill must be dismissed and the defendant required to make his defense in an action at law. It is there said:

"That being the case, I am not satisfied that it is expedient to render an affirmative decree upon this cross-bill, but upon the other hand, to leave the liability of the Winchester Company upon the note to an action at law.

Hamilton v. *Cummings,* 1 Johns', Ch. 517.
Insurance Co. v. *Stanchfield,* 1 Dill., 424.

"The cancellation of an 'executed contract is an exertion of the most extraordinary power of a court of equity' (*Atlantic De Laine Co.* v. *James,* 94 U. S., 207) and, as the defense to the note is open to the Winchester Company hereafter, I have determined to dismiss the bill without prejudice to the right of the company to interpose its defenses in any action which may be brought, except the defense of fraud."

We respectfully submit the two several judgments of the Circuit Court of Appeals should be reversed, and directions given the Circuit Court to dismiss the amended and supplemental bill of complaint.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for Petitioner.

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No. 351.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

ALICE A. OAKLE, Administratrix of the Estate of Herman D. Oakle, deceased,
Petitioner,
vs.
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

REPLY BRIEF.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for Petitioner.

THE SUNTHORP-WARREN PRINTING CO., 519 RANDOLPH ST., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

REPLY BRIEF.

QUESTION OF JURISDICTION.

In discussing the jurisdiction of the court, counsel for respondent have quoted from 2 Pomeroy's Equity Jurisprudence, Sec. 912, by which it is shown that the English Chancery Courts take jurisdiction of every case of fraud, although courts of law have concurrent jurisdiction and can administer the same kind of relief.

Counsel evidently did not discover Sec. 914 of the same volume, where it is clearly laid down that the courts of the United States have no such jurisdiction and that the English

rule is not the law in this country. This eminent author says:

"Sec. 914. The American Doctrine.—In a few of the earlier decisions the English rule was adopted to its full extent. This, cannot, however, be regarded as the present American doctrine. As was shown in the former volume, in several of the states only a partial and very narrow equitable jurisdiction was for a long time conferred, and this was strictly limited by the courts to the very matters specified by the statutes. In other states, the equitable jurisdiction was defined by statute as embracing only those cases for which there was no adequate remedy at law. Influenced partly by the tendency of this legislation, and partly by the supposed constitutional guaranties of the jury trial, which were construed to forbid the interposition of equity in controversies which could be determined at law, the equity courts of the United States and of the several states have practically abandoned a large part of the jurisdiction in matters of fraud, which is confessedly held by the English Court of Chancery. The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain and complete. The language on this subject often used by judges, represents nearly the entire jurisdiction of equity in matters of fraud, whatever be the remedies granted, as concurrent with that at the law, and as not *existing* where adequate legal relief can be given. The inaccuracy of this mode of expression has been shown in the former volume. The true doctrine is that where the estate or interest is equitable, the jurisdiction exists and will always be exercised; where the estate, interest or right is legal, and the remedies are equitable, the jurisdiction always exists, but will not always be exercised where the right is legal and the remedy is pecuniary and legal, the jurisdiction is concurrent and only exists where the remedy at law is inadequate. I have placed in the foot note a number of recent decisions, arranged in groups according to the nature of their reliefs, merely as examples and illustrations of the doctrine adopted by the American courts."

It will thus be seen that the English decisions relied on in the opinion of the Court of Appeals, as well as by respondent here, are not authorities in the courts of the United States, the jurisdiction of the Federal courts being wholly dependent upon the Statutes and Constitution of the United States. Sec. 723 of the Revised Statutes denies the right of the court to take jurisdiction in cases where there is a plain, adequate and complete remedy at law.

It is further claimed that the United States Circuit Court should take jurisdiction in this cause for the reason that the state courts do not enforce the same rule of law as that which governs the Federal court and that the Federal rule is much more favorable to the respondent.

It is said under the Federal rule that McCabe, the agent of the insurance company, had no power or authority to waive the provisions of the application, that the policy was to go into effect "only upon payment of the first premium and delivery of the policy during my lifetime, sound health and insurable condition," but under the rule as enforced by the state courts, McCabe had the power to waive this provision. We agree with counsel that under the rule in the case of *Hancock Life Ins. Co.* v. *Schlink*, 175 Ill., 284, respondent is liable to petitioner for the amount of the policy, but deny that any different rule prevails in the Federal court. The rule laid down in the *Schlink* case is based upon a construction of Sec. 23 of the Life Insurance Statute of Illinois, set out in the appendix to respondent's brief.

The contention that Sec. 23 of the act entitled "An Act to organize and regulate the business of Life Insurance," refers only to "wildcat" companies is extremely strange. This act not only regulates the business of life insurance companies organized under the laws of the State of Illinois,

but also gives permission to foreign companies to do business in this state upon complying with certain conditions. It was under the provisions of this statute that appellee was licensed to do business in the State of Illinois. To say that the provision of this statute does not refer to foreign insurance companies, but only to such as are forbidden by the laws of the state to do business herein, is an impossible construction. "Wildcat" companies are forbidden by the criminal laws of the state from doing any business in the State of Illinois, and no court should presume that a legislature would enact a law declaring certain persons to be agents of a company when that company is excluded from transacting business in the state.

McCabe, it is conceded, was authorized by the company to deliver the policy and collect the premium, but it is claimed he was not authorized to waive any of the provisions of the policy. It is not a policy, however, until it is put in force and contract relations exist between the parties. "The restriction inserted in the policy upon the power of the agent to waive any condition, unless in a particular manner, as by indorsing the waiver on the policy, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premium with full knowledge of the actual situation. This doctrine has been applied to both general and other soliciting agents."

American and English Ency. of Law, 16 Vol., 949, 2 Ed.

In *Wood* v. *American Fire Insurance Co.*, 149 N. Y., 382, it is said:

"That general agents of an insurance company may waive stipulations and provisions contained in the policy with re-

spect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it with knowledge of all the facts and receiving the premium, has long been settled. It is obviously just that a party to a written contract should be precluded from defeating it by inserting conditions and stipulations contained in it, which would prevent its inception and which he knew at the time he delivered it and accepted the benefits were contravened by the actual facts, that any statement of the reasons upon which the rule rests, is no longer necessary."

This doctrine is supported by decisions of the highest courts of Georgia, Kentucky, Michigan, Missouri, New York, Pennsylvania, South Carolina, Texas, West Virginia and Wisconsin.

But outside of this, the authority of the agent, McCabe, being controlled by the statute of the State of Illinois, the Federal court is bound to adopt the construction of such statute made by the Supreme Court of the state. It is not a question of general commercial law, but one of the power of the agent, McCabe, under Sec. 23 of the statute concerning life insurance companies. The Federal courts have invariably followed the construction of state statutes which the Supreme Court of the state has placed thereon. In *United Firemen's Ins. Co.* v. *Thomas*, 92 Fed., 127, it was declared that no decision had been rendered by the Supreme Court of the state upon a certain section of the Fire Insurance Company Act, and the Court of Appeals declined to follow certain *obiter* statements made in *Insurance Company* v. *Ruckman*, 127 Ill., 264.

Sec. 23 has been passed upon by the Supreme Court of Illinois in *John Hancock Mutual Life Insurance Company* v. *Schlink*, 175 Ill., 284, and it was deliberately held that a local agent had the power to waive a provision of a policy providing that it should be delivered only during the sound

health of the insured, and also that the same agent had the power to extend credit for the payment of the premium.

A late expression upon this subject is found in the case of *McMaster* v. *New York Life Ins. Co.*, 183 U. S., 25. The policy in that case had a provision similar to the present one, that no agent had power to change or modify the contract and that such power could only be exercised by certain principal officers of the company. The policy was dated December 18th, and delivered on December 26th, but provided that the next yearly premium should be paid upon the following 12th day of December. It is said by this court:

"So that, notwithstanding the premiums in this instance were not actually paid and received and the policy delivered until December 26th, it may be conceded that in accordance with the practice in such matters the contract of insurance commenced to run from December 18th, rather than from December 26th."

In the *McMaster* case the rule laid down in *Continental Life Ins. Co.* v. *Chamberlain*, 132 U. S., 304, is expressly followed and the principle again affirmed that the statute of the state may make a person an agent of an insurance company, although the company seeks by its policy to avoid such an effect and could do so were it not for the statute.

Sioux City v. *N. A. Trust Co.*, 173 U. S., 99.
New York Life Ins Co. v. *Cravens*, 178 U. S., 389.

The Merits.

We are by no means willing to concede the claim made by the respondent that in procuring insurance the applicant must disclose everything relating to his physical condition, whether such request is made in the application or not, and that subsequent to the application and before the delivery of

the policy, if any change has occurred in his condition, then such fact must be reported to the company, else the policy is obtained by fraud and is void. Upon the making of a truthful application and its acceptance by the company and the issuance of a policy thereon, a complete contract is made between the parties. The company insures the person from the time of the issuance or date of the policy and is paid for such insurance. His condition subsequent to that time is a matter which should in no manner affect the validity of the insurance. The company demands and exacts payment for insurance upon the life of the insured from the date of the issuance of the policy and the payment of the premium carries the contract from the date which is placed thereon by the company. If the insured was then a proper subject for insurance and had complied with all the conditions and provisions of the policy, the company cannot be heard to say that subsequent to that time and before delivery of the policy his condition had so changed as to vitiate the contract, although it had received payment for insurance upon his life for a time prior to the origin of such change. There is nothing in the policy of the law which forbids such a construction. The rule upon this subject is laid down in the case of *Mutual Benefit Life Ins. Co.* v. *Higinbotham*, 95 U. S., 380. There a policy of life insurance had lapsed and the insured, for the purpose of reinstatement, made a representation as to the state of his health on October 1st. The renewal receipt was not delivered until October 11th. Between those dates the condition of the applicant's health had changed and the insurance company defended the policy upon the ground that it was a fraud upon it for the insured to receive the renewal receipt on October 11th without disclosing his changed condition. This court, however, held that the company was bound, that the representations re-

ferred to October 1st and there was no duty upon the insured to make further statements concerning his condition at the time of the delivery of the renewal certificate. It is there said:

"We are of the opinion that the exceptions to the charge of the judge upon the theory that representations by Dr. Day were made on the 14th day of October, or that concealment was then practiced by him on the ground that the previous representations necessarily and as a matter of law were continuous, and that the contract was consummated on that day cannot be sustained. It was a question proper under all of the circumstances for the consideration of the jury. If they had found for the plaintiff, we are of the opinion that the verdict would not have been vacated as being without or against the evidence.

In many English cases a formal acceptance of the proposal for insurance is issued. In some companies its acceptance is unconditional, so that the premium be paid within the month, the letter of acceptance running to the effect that the proposal has been accepted and that a receipt is ready at the office for the premium, upon the payment of which the insurance will commence, but that if the same be not paid within thirty days a reappearance and fresh certificate will be required. In other companies the acceptance is qualified by the condition not only that the insurance shall not commence until the payment of the claim, but that no material change shall occur prior thereto.

Bunyon, 58, cited in Bliss, Sec. 99.

The practice is not uniform and there is nothing remarkable in allowing a certificate of health to stand good for thirty days, no reappearance or examination for that interval being required."

In the case at bar the insurance company issued its policy, dated February 6, 1899, and the payment of the premium for the year, continued the policy in effect until February 6, 1900. It was intended by the parties that the contract should begin upon that day and the company received payment for insurance from that time. If, therefore, the condition of the insured complied with all of the provisions

of the contract upon that day and the company received payment therefor, it is inequitable and unjust for it to claim that because the assured subsequently was not in an insurable condition therefore the policy was void and of no effect. Should it desire to have its contracts not go into effect until the premiums are paid and the policy delivered it should not exact payment of premiums for insurance prior to the time of the delivery of the policy. If it does so then the contract relates back to the time when the company itself has said the policy should go into effect.

It must be remembered that the provision providing that the policy "to be issued hereon shall take effect only upon the payment of the first premium and delivery of the policy during my lifetime, sound health and insurable condition" is contained in the application of Mr. Cable which was dated January 16, 1899. This proposition contemplated that Mr. Cable should receive insurance from the time for which he was to pay premiums to the insurance company. He did not intend, nor was it the understanding that the company was to receive payment for a certain time during which no insurance was to exist upon the life of the applicant. The company issued its policy upon this application and stated therein that the applicant is insured from the 6th day of February, 1899, and received payment of the premium provided for in the policy. The form of the application, as well as of the policy is drawn by the insurance company. Any question concerning its construction is decided in favor of the insured. When upon this application the insurance company issued its policy and said that it should be in force from and after the 6th day of February and received payment of the premium, is it not reasonable to construe the application and policy as meaning that in his application the assured agreed that his condition should not change up to

the time when the policy by its terms was to go into force? The company having set the 6th day of February as the time and the assured being without question a good risk at that time, and having paid the premium exacted by the company for insurance from that day, the policy under its terms should be in full force and effect notwithstanding Mr. Cable subsequently became sick.

The application signed by Mr. Cable which is dated January 16th, is an offer to the insurance company to pay it the sum of $848 per year upon the issuance to him of an insurance policy. When this proposition is accepted by the insurance company and the date of the policy is fixed as February 6, 1899, a complete contract is then made between the parties and all of the representations contained in the application refer to that date. When the insurance company issues its policy and forwards it to its agent for delivery, the insured would have the right to compel the delivery of the policy to him upon payment of the premium notwithstanding the agent might refuse to deliver the policy.

New York Life Ins. Co. v. *Babcock*, 104 Ga., 67.

Newark Machine Co. v. *Kenton Ins. Co.*, 50 Oh. St., 549.

When the proposition contained in the application is accepted by the company and its policy issued, it becomes a complete contract and from thenceforward the insured is entitled to the benefits of his contract.

Travis v. *Nederland Life Ins. Co.*, 104 Fed., 486; 43 C. C. A., 653.

Where the policy is dated as of a certain time, it goes into force as of that date, although the policy may not be delivered and the premium paid until a subsequent date.

In the McMaster case, *supra,* the policy was dated December 18th, but not delivered until December 26th when the premium was also paid, it is said:

"The truth is the policies were not in force until December 18th, and as the premiums were to be paid annually and were to be paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th."

Here is a distinct holding that the policies being dated at a certain time and the premiums paid for insurance from that time, although the policies were not delivered and the premiums paid until eight days later, the policies nevertheless were in force as of the date placed thereon by the insurance company. The insurance company having itself fixed this date as the time when the policy should begin to run if the insured met all of the conditions of his application at that time, it could in no manner affect the contract if thereafter his condition was changed. This being so, no possible fraud could arise in the procurement of the policy even had the insurance company not been notified in any manner of the sickness of Mr. Cable. When the proposition contained in the application is accepted by the insurance company and the time fixed in the policy when the same was to begin to run, the payment of the premium, causes it to take effect from that day.

Mutual L. Ins. Co. v. *Thomson,* 94 Ky., 253.
Yonge v. *Equitable L. Ins. Co.,* 30 Fed. Rep., 902.

Multiplicity of Suits.

Upon the question of multiplicity of suits urged by respondent, it is admitted by the bill of complaint that the commuted value of the policy is sued for and claimed by petitioner and not the several installments provided for in the policy. There is no contention that under the policy the beneficiary may not elect to receive the commuted value of $30,000 or to receive thirty several installments of $1,666.66 each, but it is said that the administratrix had no authority without direction of the Probate Court to elect to receive the commuted value, and that, therefore, her action in bringing suit for the commuted value is without authority. As sustaining this position, counsel cites Sections 82 and 84 of the Act Concerning Administration of Estates, of the State of Illinois, wherein it is provided that an executor or administrator may under an order of court compound or sell a desperate claim and may also under the order of the County Court compound or sell claims which fall due at a period so remote as to prevent their collection within the time required for final settlement of the estate, which last claims shall not be sold or compounded at less than 10 per cent. below the value thereof. There is no other provision of the state statutes restraining or curbing the authority of executors or administrators as to their powers concerning the collection of debts due the estate.

The suit brought by the petitioner is not for a desperate claim, nor is she endeavoring to compound or sell the same and consequently it does not fall within the provisions of the statutes cited by respondent. Her authority is that which is given to her under the common law, and by the common law she has complete authority to act concerning the claim as if it were her own property. She had the

right to arbitrate, to release, settle or compromise the claim without any order whatsoever from the court, only subject, however, to answer to the estate for the value of the claim, should she act in bad faith. And this is the law of Illinois, as settled by the case of *Short* v. *Johnson*, 25 Ill., 489. There is no necessity for an order of the Probate Court directing the administratrix to sue for the commuted value, but if such were the fact there would be no difficulty in procuring such an order which would ratify all acts done by her in that respect. The possibility of the abandonment of the suit now pending and the institution of new suits for the several installments as they would have fallen due is a very remote contingency which would hardly warrant a court of equity in issuing an injunction against such a possibility. Having elected to take the commuted value, we are bound by such election.

As to the possible loss of the proofs of fraud in the death of the witnesses, Lord and McCabe, such possibility arises in every law suit which is instituted in the courts of the State of Illinois, and if such a contingency is a ground for the bringing of a bill in equity, every case instituted would give the right to such a bill.

Respectfully submitted.

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Brief of Beale for Respondent

SUPREME COURT OF THE UNITED STATES.

Filed April 5, 1902.

OCTOBER TERM, A. D. 1901.

ALICE A. CABLE, Administratrix, etc., vs. THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,	Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT OF WILLIAM G. BEALE ON BEHALF OF RESPONDENT, IN OPPOSITION TO THE GRANTING OF SAID PETITION.

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IN THE

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STATEMENT.

The record submitted consists practically of two parts containing the two distinct records in the Circuit Court of Appeals, bound together. The first part, with paging in Roman numerals from I to XLIX, is the record on the first appeal to that court from the decree of the Circuit Court sustaining a demurrer to the bill and dismissing the bill; and the second part, with paging in Arabic numerals from 1 to 180, is the record on the second appeal to the Circuit Court of Appeals from the decree of the Circuit Court in favor of respondent on final hearing. Each part is separately indexed, immediately preceding

its first page. The opinions on the two appeals are shown, respectively, at pages XXVIII–XLVII and 163–180.

On the 11th day of May, 1899, respondent filed in the Circuit Court of the United States for the Northern District of Illinois its original bill for the cancellation of an insurance policy, and for an injunction against a threatened action at law upon the policy. On the same day a motion for a preliminary injunction was filed, application was made and granted for a temporary restraining order pending a hearing upon the motion, and a chancery subpoena was issued and served upon petitioner. Likewise, upon the same day, but about an hour, or an hour and a half before the filing of the bill, the threatened action at law was begun in a state court of Illinois, the Superior Court of Cook County, in said district, and four days later the summons in the action was served upon the respondent. Subsequently, an amended and supplemental bill was filed, the supplemental matter showing the action at law. A demurrer was interposed to this amended and supplemental bill, and upon argument it was sustained, the motion for a preliminary injunction was denied, the temporary restraining order was vacated, and the bill was dismissed. Upon appeal the decree dismissing the bill was reversed, and the suit proceeded to a final hearing. The motion for a preliminary injunction was never renewed, no injunction was ever issued, and there has been no interference by the Federal court with the prosecution of the action at law. Upon final hearing a decree was rendered in favor of the respondent (*Rec.*, 147), and this was unanimously affirmed in the Circuit Court of Appeals, where, however, one of the judges made a non-committal reservation upon the question of jurisdiction settled by the first appeal, in which he had not participated. (*Rec.*, 180.)

The petitioner claims (*Petition, p.* 12), that the record presents two special questions calling for the extraordinary interposition of this court by the writ of *certiorari*. One of them—the second one—relates to the merits of the case, upon which four judges have concurred—or rather, it may be said, *six*, for five different judges sat in the Circuit Court of Appeals on the two appeals, and Judge BUNN delivering the opinion of the court in the first appeal, said of the facts afterwards proved: "The fraud perpetrated is something quite appalling in the baldness and boldness of its outlines."

This unanimity of opinion on the part of so many judges below is sufficient in itself to create a strong presumption against the existence of any ground requiring this court to review the merits of the decree. And the decree will be found abundantly supported upon even a cursory examination of the record. This second question suggested is not a question of law, but manifestly one to be answered in accordance with the special facts appearing. The answer of the petitioner to the amended and supplemental bill averred that the "true condition" of the insured "was fully told and made known" to the respondent prior to the delivery of the policy, and that the death of the insured was not occasioned by pneumonia. The decree sought to be reviewed, and the decision of the Circuit Court of Appeals sustaining it, both proceed upon the ground,—directly contrary to the assumption contained in the alleged question,—that, in fact, there was *not* notification to the respondent of *the illness* of the applicant for insurance by the person who procured the delivery of the policy when the applicant lay upon his death-bed in the throes of acute pneumonia. The Circuit Court was unwilling to find the fraud

intentional, but no such unwillingness actuated the Circuit Court of Appeals, which went further and said:

(*Rec.*, 178.) "It is, however, urged that sufficient information was disclosed by Lord to McCabe to put the company upon inquiry, and that, with such notice, McCabe delivered the policy and received the premium; that McCabe was the agent of the company and notice to him was notice to the company, and the delivery of the policy constituted a waiver of the condition and warranty. Upon the assumption that McCabe was such agent of the company and that his action must be treated as the action of the company—questions which we do not determine—it becomes us to inquire of the sufficiency of the notice given, and whether the act of delivery of the policy involved a waiver of the warranty. * * *"

(*Rec.*, 180.) "It cannot here be doubted that if the insurance company or McCabe as its agent had been informed of the fact, within the personal knowledge of Lord, that Cable was seriously ill with acute pneumonia, the policy would not have been delivered. It is difficult for us to believe that Lord, with that knowledge, could think he had a right to accept this policy; but whether so or not, the concealment of the fact was a fraud upon the company. The statement made was deceptive and misleading, whatever were the intentions of Lord, and a court of equity ought not to permit the completion of the wrong. Courts of equity cannot sustain an insurance upon the life of a dying man, when the nature of his malady and the seriousness of his illness are concealed from the insurer."

The first question put forward by petitioner, and obviously deemed by her counsel to be the more important one, is stated in the petition (p. 12), to be the following:

"The fundamental question of the right of a foreign insurance company to bring a suit in equity in the United States courts to cancel a policy of insurance issued by it after loss has occurred upon the policy and after suit has been brought upon the policy in a state court, where the statute of the state forbids a removal of such action at law to the Federal court under penalty of forfeiture of the

license of the insurance company to do further business in the state."

The general question thus stated is interesting and important, but in the view of counsel for respondent it is not the question presented on this record. No such general question necessarily has to be decided. The precise question presented for decision, as counsel for respondent conceive it, is whether the record shows error on the part of the courts below, in taking and retaining equitable cognizance of the controversy, or otherwise, in such manner or with such result as to call for the extraordinary interposition of this court by *certiorari*. All other questions are subordinate and incidental. The state statute against removal is only one jurisdictional element, though an important one.

BRIEF AND ARGUMENT.

I.

It has been many times decided that the issuance of writs of *certiorari* to review final decisions of Circuit Courts of Appeals is discretionary; and that the authority to issue such writs should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

Where a possible error sought to be corrected by *certiorari* is not specially important in its immediate effect upon essential rights, nor specially far reaching in its consequences, this court has uniformly refused to issue the writ.

Smith v. *Vulcan Iron Works*, 165 U. S., 518, 526.

American Construction Company v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S., 372, 383, 385, and other cases therein cited.

II.

Upon the merits this case has been correctly decided and the only real question in it—the only one affording reasonable ground for discussion—is whether error was committed in taking jurisdiction of it in equity.

III.

Under the special circumstances shown by the record a resort to equity was proper. The respondent did not have a "plain, adequate and complete" remedy at law, as such remedy is understood in the Federal courts. Its constitutional right to have its case tried in a Federal court of law had been hampered, embarrassed and practically destroyed by an Illinois statute. It was liable to a multiplicity of suits, and to a loss of evidence through lapse of time.

IV.

It is not sufficient that a suitor may have a legal remedy in a state court, otherwise state legislation by extending legal remedies might destroy all equitable jurisdiction on the part of Federal courts. The "plain, adequate and complete" remedy at law which is a bar to equitable relief in a Federal court must exist on the law side of the same court.

Smyth v. *Ames*, 169 U. S., 466, 516.

Mississippi Mills v. *Cohn*, 150 U. S., 202, 205–6.

Niagara Fire Ins. Co. v. *Cornell*, 110 Fed., 816.

Coler v. *Board of Commissioners*, 89 Fed., 257.

Mayer v. *Foulkrod*, 4 Wash. Circ. Ct., 349 (16 Fed. Cas., 1231).

Bean v. *Smith*, 2 Mason, 252 (2 Fed. Cas., 1143, 1150).

Stanton v. *Embry*, 46 Conn., 595.

V.

Though respondent might, upon learning of the action at law brought against it, have abandoned its bill and removed the action at law to the Federal court, that course would have been fraught with danger in consequence of the Illinois statute against removals under which a controversy with the state authorities and an attempted revocation of respondent's license would have been certain to follow.

The statute is repugnant to the Federal Constitution and void, along with the agreement not to remove required by it.

Barron v. *Burnside*, 121 U. S., 186.

Southern Pacific Co. v. *Denton*, 146 U. S., 202, 207.

Galveston, etc., Railway v. *Gonzales*, 151 U. S., 496, 502.

Barrow Steamship Co. v. *Kane*, 170 U. S., 100, 111.

Blake v. *McClung*, 172 U. S, 239, 255.

Chattanooga R. & C. Co. v. *Evans*, 14 C. C. A., 116, 120; 66 Fed., 809, 814.

Metropolitan L. Ins. Co. v. *M'Nall*, 81 Fed., 888.

Mut. L. Ins. Co. of N. Y. v. *Boyle*, 82 Fed., 705.

Commonwealth v. *E. Tenn. Coal Co.*, 30 S. W., 608 (Kentucky).

Commonwealth v. *Jellico Coal Min. Co.*, 30 S. W. Rep., 611 (Kentucky).

And see, also,

Dayton Coal & Iron Co. v. *Barton*, 22 Sup. Ct., 5; — U. S. —, decided Oct. 21, 1901.

But the existence of the statute and the attitude of the state authorities with respect to it prevented respondent from having a "plain, adequate and complete" remedy at law.

Lewis v. *Cocks*, 23 Wall., 466, 470.
Root v. *Railway Co.*, 105 U. S., 189, 216.
Kilbourn v. *Sunderland*, 130 U. S., 505, 514–5.
Smith v. *Am. Nat. Bank*, 32 C. C. A., 368, 376; 89 Fed., 832.
Pacific Express Co. v. *Seibert*, 44 Fed., 310, 315.
Bank of Kentucky v. *Stone*, 88 Fed., 383, 391.

Material portions of the Illinois statute are as follows:

"§ 1. *Be it Enacted by the People of the State of Illinois, represented in the General Assembly:* It shall not be lawful for any insurance company, association or partnership, incorporated by, or organized under the laws of any other state of the United States, or of any foreign government for the purpose of insuring against loss or damage by fire, or against the risks of inland navigation or transportation, or for the purpose of life insurance, or for the purpose of insuring persons against accidents, to take risks or to transact any business whatever, authorized by its charter within this state, until it shall have complied with the following requirements, in addition to those already imposed by existing law: It shall first file with the auditor of public accounts a written application for a license to do business in this state, duly signed by its president and secretary, with its corporate seal attached, which statement shall contain the following

declarations: that it desires to transact the business of insurance in this state; that it will accept a license therefor according to the laws of this state, and that said license shall cease and terminate in case, and whenever it shall remove or make application to remove into any United States court, any action or proceeding commenced in any of the state courts, of this state, upon any claim or cause of action arising out of any business transaction, in fact, done in this state; any permission, consent, agreement, condition or provision incorporated in any contract, mortgage, note, bond, obligation or policy of insurance authorizing or consenting to such removal, to the contrary notwithstanding.

"§ 2. Upon complying with the requirements of section one of this act, together with all other requirements now imposed by existing law, the auditor of public accounts shall issue to such incorporated company, association or partnership a license to transact its business in this state, and no such license shall be issued until all of said requirements shall have been complied with; and no such incorporated company, association or partnership shall carry on the business for which it may have been incorporated, within this state until it shall have obtained such license: the fee for such license shall be the same as that provided for by existing law, to be paid by the incorporated company, association or partnership so securing such license.

"§ 3. If any such incorporated company, association or partnership shall remove, or make application to remove into any United States court any action or proceeding commenced in any state court of this state upon a claim or cause of action arising out of any business, or transaction in fact done in this state although there may have been a stipulation authorizing such removal, or if it shall violate, or fail to comply with, any of the other requirements or conditions now imposed by existing law, it is hereby made the imperative duty of the auditor of public accounts, at once to revoke, cancel and annul the license issued to such incorporated company, association or partnership; and thereafter no such incorporated company, association or partnership shall transact within this state any of the business for which it was incorporated

until again fully licensed. In case such revocation of license shall be made because of the removal of, or the attempt to remove any action from a state court of this state to any United States court no renewal of such license shall be made within three years after such revocation. Whenever any such license shall be revoked, the auditor of public accounts shall give notice of such revocation by mail, to the president and secretary of such corporation and shall also cause a notice of the same to be published three times in some weekly public newspaper, published in the City of Springfield. A certified copy of the order of removal, shall be sufficient evidence of the removal of any cause."

The answer of petitioner admits that it would be the duty of the state authorities under the foregoing statute to revoke respondent's license in case it attempted a removal of the action at law to the Federal court (*Rec.*, 30), and petitioner's counsel, in their brief (p. 6), even now argue in favor of the validity and effectiveness of the statute. The Supreme Court of Illinois seems impliedly to have upheld the statute in *People* v. *Pavey*, 151 Ill., 106.

VI.

The possibility of a multiplicity of suits against respondent for separate annual installments under the policy was additional ground for equity to take jurisdiction.

Boyce's Executors v. *Grundy*, 3 Peters, 210, 215.

Buzzard v. *Houston*, 119 U. S., 347, 352.

Bank of Kentucky v. *Stone*, 88 Fed., 383, 392.

Town of Springport v. *Teutonia Sav. Bank*, 75 N. Y., 397.

The power of the administratrix to make a final and conclusive election to take the commuted value under the policy without authorization by the Probate Court of Cook County, is at least doubtful. See *Washington* v. *Louisville and Nashville Ry. Co.*, 136 Ill., 49, at page 56, construing a pertinent Illinois statutory provision. The bill alleged lack of authority on the part of the administratrix to make such an election and alleged that she had demanded payment of both the first installment and the commuted value. It might well have been, and might be even now but for the existing decree, that the respondent would be subjected to a series of actions in different jurisdictions, for installments periodically falling due. There is no time limit in the policy barring actions upon it.

VII.

So, also, resort to equity was further sustainable on the ground that respondent might lose important evidence (*e. g.*, the testimony of the witness McCabe) through lapse of time..

Fuller v. *Percival*, 126 Mass., 381.
Schmidt v. *West*, 104 Fed., 272.

VIII.

Even assuming for the sake of argument that it was a clear error on the part of a court of equity to take jurisdiction of the case, it does not follow that the writ of *certiorari* should be granted. The case has no general nor far reaching consequences, in principle or otherwise. If it were submitted to a jury on this record the submission would be an idle form. The court would direct a verdict for re-

spondent on the almost undisputed facts. No verdict for petitioner could stand. Under such circumstances, harmless error would not be ground for the reversal of a judgment in favor of respondent, and it should not cause the issuance of a *certiorari*.

The questions in the case were almost entirely questions proper to be decided by a court and not by a jury.

Pleasants v. *Fant*, 22 Wall., 116.
Hendrick v. *Lindsay et al.*, 93 U. S., 143.
Oscanyan v. *Arms Co.*, 103 U. S., 261.
People's Savings Bank v. *Bates*, 120 U.S., 556.

IX.

Phoenix Ins. Co. v. *Bailey*, 13 Wall., 616, is the principal reliance of petitioner's counsel in support of the contention that a policy of insurance cannot be cancelled in equity after loss and action brought. The case does not take any such broad ground. It holds that in the absence of *special circumstances* equity will not take jurisdiction of such a suit for cancellation.

X.

Petitioner's counsel contend (*Brief*, p. 9), that under *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U. S., 51, the state court had "*exclusive* jurisdiction over the subject-matter,"—whatever that expression of counsel may mean. There has been no injunction granted, and nothing has interfered with the jurisdiction of the state court over the action there pending. This

contention seems to be about the equivalent of a plea of *lis pendens*, which manifestly would not be good. The case cited is not in point. See

Stanton v. *Embry*, 93 U. S., 548, 554.
Ogden City v. *Weaver*, 47 C. C. A., 485, 489; 108 Fed., 564, 568.

It is respectfully submitted that the petition should be denied.

WM. G. BEALE,
For Respondent.

FILE COPY. 352

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

Office Supreme Court U. S.
FILED
OCT 12 1903
JAMES H. McKENNEY,
Clerk.

No. 28.

ALICE A. CABLE, Administratrix of the Estate of **HERMAN D. CABLE,** deceased,
Petitioner,
vs.
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT OF WILLIAM G. BEALE FOR RESPONDENT.

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STATEMENT.

The statement of the case in the brief of counsel for the petitioner is not quite satisfactory to counsel for the respondent, particularly in not seeming to be sufficiently full upon certain points deemed material, and, therefore, it is thought best to present here a complete statement of the proceedings had in the courts below, and of the facts under review. It is believed that at least the convenience of the court in its consideration of the record will be thereby promoted.

THE CASE.

Two general questions are involved: First, whether the Circuit Court committed reversible error in exercising its equitable jurisdiction; and second, whether it committed reversible error in its decree upon the merits.

On the 11th day of May, 1899, respondent filed in the Circuit Court of the United States for the Northern District of Illinois its original bill for the cancellation of an insurance policy written upon the life of Herman D. Cable, and for an injunction against a threatened action at law upon the policy. The bill alleged, in substance, that on February 24, 1899, after the policy had been written, but was yet undelivered and unaccepted, Herman D. Cable became ill of pneumonia; that on February 27, 1899, while he was in the throes of that disease, and three days before his death resulting therefrom, which occurred March 2, 1899, his friend George S. Lord paid the first premium and obtained the policy from the company by fraudulently concealing the

illness; that the company had no knowledge of Cable's illness until his death, when it tendered back the premium with interest and demanded a return of the policy, which was refused; that among the conditions contained in the application for the policy there was one that the policy should take effect only in case of its delivery during the sound health and insurable condition of the insured; that under the circumstances the policy never took effect; and that the policy was at the time of the filing of the bill in the hands of the defendant, who was demanding payment of it. On the day the bill was filed a motion for a preliminary injunction was also filed, application was made and granted for a temporary restraining order pending a hearing upon the motion, and a chancery subpœna was issued and served upon petitioner. Upon the same day, but, as it happened, about an hour or an hour and a half before the filing of the bill, petitioner began the threatened action at law against respondent, in a state court of Illinois, (the Superior Court of Cook County), in said district, in the usual manner by causing a summons to be issued, and four days later, May 15, 1899, the summons in the action was served upon the respondent. Subsequently, an amended and supplemental bill was filed,—the supplemental matter setting forth the actual commencement of the action at law, and the service of process in both proceedings. The bill also contained allegations, to which particular attention will presently be called, setting up special circumstances to establish that the complainant was without plain, adequate and complete remedy at law, and especially so in the federal court. A demurrer was interposed to this amended and supplemental bill, and upon argument the demurrer was sustained, the motion for a preliminary injunction was de-

nied, the temporary restraining order was vacated, and the bill was dismissed. Upon appeal the decree dismissing the bill was reversed, and the suit was remanded for further proceedings. (*United States Life Ins. Co. in the City of New York* v. *Cable,* 39 C. C. A., 264; 98 Fed., 761; printed in an appendix to this brief.) The cause having been redocketed, the defendant filed her answer, claiming that the policy was delivered to Lord by complainant's agent, who was at the time fully informed of Cable's illness, and that the delivery of the policy bound the company. No further injunction was issued or applied for. After the filing of a replication the cause was referred to a master in chancery, with directions merely "to take the evidence in said cause and to report the same" to the court. (*Rec.*, 32.) In addition to taking and certifying the evidence, the master made a report containing his findings and conclusions as to the facts. (*Rec.*, 34.) The order of reference did not authorize the master to make any findings, and consequently the report was merely advisory to the court, was not formally in the case as a matter to be acted upon, and carried no technical legal presumptions in its favor. Exceptions to it, even if proper, being unnecessary to insure consideration of the case upon the entire evidence no exceptions were filed on behalf of the complainant, though the report, while in the main correct, was objectionable in respect of one finding hereinafter mentioned. The defendant filed exceptions, and the court in its decree passed upon them. After final hearing upon the pleadings, the report and the evidence, the district judge read and handed down a written opinion as follows (*Rec.*, 183; in cross-appeal, cause number 775):

> "In this case I am of the opinion that as a matter of law the delivery of the policy in question herein

was not consummated until its receipt by Mr. Lord, and that at the time of such delivery he did not, as a matter of fact, fully disclose to the agent of complainant, who brought the policy to him, the serious nature of the illness of defendant's decedent. The evidence discloses no intentional fraud on the part of Mr. Lord in this regard, but simply that in the hurry of business his remarks as to the illness of Mr. Cable were not sufficient to apprise the agent of the complainant of the nature of such illness, which was a material matter affecting the intended contract between complainant and Mr. Cable which was to be evidenced by said policy. On this ground I am of the opinion that the delivery of said policy to Mr. Lord was induced by what in law should be considered constructive fraud. A decree may be prepared in accordance with the foregoing opinion, directing the cancellation and delivery to complainant of the policy in question upon the payment by complainant of the premium received by it on account thereof. The costs of this proceeding will be taxed against the defendant."

The decree, subsequently entered (*Rec.*, 147), granted the relief sought by respondent, except that no injunction was ordered against petitioner to restrain her from prosecuting her action at law. The petitioner was left free to carry on her proceeding in the state court, but jurisdiction was reserved in the decree for any future steps necessary to execute it. In order to support the conclusion that, while there was a concealment of material fact constituting fraud, the fraud was *merely constructive*, the court incorporated in the decree certain findings of fact, which, it was contended by complainant's counsel, were unwarranted by the evidence. These findings were, in substance, (1) that at the time of the delivery of the policy by McCabe, an insurance broker, to Lord, the latter told McCabe "that Cable had been sick for two or three days, but was no worse than he had been for the past forty-

eight hours"; (2) that such statement was made by Lord "in good faith and without any intention to defraud the complainant or conceal the real condition of the health of said Cable"; and (3) that "no actual fraud was intended or practiced" in the delivery of the policy. The master had taken a different view of Lord's intent in making the statement above referred to, and the decree modified the report to make it conform to these findings of the court, and approved it as thus modified.

To that modification and to those findings by the court the complainant excepted (Rec., 155), believing that the evidence showed a deliberate and intentional concealment on the part of Lord, and, therefore, a plain fraud perpetrated by him. The defendant upon taking her appeal did not assign errors to the *findings*, and it therefore appeared to complainant's counsel to be a matter of some doubt whether *upon that appeal alone* the Circuit Court of Appeals would review the findings, or consider them open for discussion, or would regard itself bound by them; and, in the latter event, whether they would prejudice the complainant's case for the *relief* sought. To avoid possible question of this kind the complainant took its cross-appeal from that part of the decree making the *findings* above specified (*Rec.*, 185), so that the cause might be heard and considered in the Circuit Court of Appeals upon the whole evidence, regardless of the findings of the master and of the Circuit Court. The original appeal (No. 762), and the cross-appeal (No. 775), were heard together as one case and were disposed of by one decision. (*Rec.*, 162; 49 C. C. A., 216; 111 Fed., 19.) The record here covers both the original appeal (*Rec.*, 1-178), and the cross appeal (*Rec.*, 179-194), which latter may, if necessary, be considered by this court, under a stipulation heretofore filed. (*Rec.*, 196.)

THE FACTS.

In January, 1899, T. J. Finney, an independent life insurance broker in Chicago, having no agency relation with any insurance company, undertook to place insurance upon the lives of George S. Lord and Herman D. Cable, residents of Evanston, who were neighbors and intimate friends, and were jointly interested in several business enterprises. Having by correspondence with Lord and Cable paved the way for the work of a solicitor, Finney employed James F. McCabe, another insurance broker (having also an agency for the Washington Life Insurance Company, but having no connection with respondent or its general agent (*Rec.*, 75, 77), to procure the applications. (*Rec.*, 79.) McCabe was probably employed for this service because, in the previous year, he had been successful in soliciting from the same men life insurance which had been placed in another company and had lapsed. (*Rec.*, 81, 82.) Subsequently, Finney, upon his own initiative, also arranged with J. H. Strong, the respondent's general agent in Chicago, as to the commissions which would be allowed him (Finney), in case he should bring the insurance to respondent. (*Rec.*, 70, 79.) Lord and Cable contemporaneously made separate formal applications, in writing, through McCabe, for insurance by respondent. (*Rec.*, 103.) Cable's application was dated January 16, 1899, and the medical examiner's report appearing upon the back thereof was dated January 17, 1899. (*Rec.*, 145.) The two applications were delivered to Mr. Strong and were by him forwarded to the home office of respondent in New York, to be passed upon, and, on February 20, 1899, Strong received from that office two

policies, for $50,000 each, written pursuant to the applications, the two policies being similar in form and calling for the same kind of insurance. (*Rec.*, 47.) Cable's policy was dated February 6, 1899, was payable to his "estate" (*Rec.*, 9), and was identical in form and in its general provisions with Lord's. (*Rec.*, 103.) On February 21, Strong turned the policies over to Finney for delivery, taking Finney's receipt therefor (*Rec.*, 77), and charging Finney with the first premium on a "tickler," which, by the custom of the business, would be cancelled if the policies should be returned undelivered. (*Rec.*, 78.) On the same day Finney turned them over to McCabe, with instructions to deliver them to Lord and to Cable, respectively, and to collect the premiums. With the two policies in his possession, McCabe, on the same day, called upon Cable and tendered him the Cable policy. Cable declined to accept it, saying that he did not have time to look into the matter at the moment, that he was very busy, and that he would be guided a good deal by what Lord said and did in the matter. (*Rec.*, 48.) After pressing him to accept, but unavailingly, McCabe finally carried away the policy, and went directly to the office of Lord, with whom he left the Lord policy for examination (together with a financial statement of the company), suggesting the sending of a check for the premium (*Rec.*, 48), and stating that he was going to leave town for a week or ten days. (*Rec.*, 102, 103.) McCabe then took the Cable policy back to Finney's office, leaving it there, and on the same day went to Cleveland.

* * *

On February 24, three days afterwards, Cable was taken ill while in Chicago, and towards evening Lord ac-

companied him to his home in Evanston. (*Rec.*, 106.) Upon reaching there a physician was called, who at once diagnosed the case as acute pneumonia (*Rec.*, 85), and the same evening a trained nurse was secured for Cable *by Lord* and brought by Lord to the Cable residence. (*Rec.*, 107.) This illness continued until March 2, a period of six days, when Cable died. During that period he was constantly under the care of trained nurses and of his family physician, and two other physicians were called in for consultation. (*Rec.*, 90.) The proofs of death filed by petitioner with respondent state unqualifiedly that Cable died of pneumonia (*Rec.*, 139), and the testimony of Doctors Clayton and Webster shows that he was in a serious and dangerous condition from the inception of his illness to the time of his death. (*Rec.*, 86, 89.) Lord was in daily communication with the Cable household, keeping himself fully informed of his friend's condition. (*Rec.*, 28, 107, 108, 113.) On Monday morning, February 27, before leaving home for his office, Lord made the usual inquiries about Cable (*Rec.* 108), and in the afternoon of the same day he procured delivery to himself of the Cable policy under the circumstances following.

***

McCabe returned to Chicago on Monday, February 27, and finding, at Finney's office, that no remittance of the premium upon the Lord policy had been received, he called upon Lord on the afternoon of that day for the purpose of collecting it. He stated his errand, and at the same time told Lord *that he had been out of town ever since the policy was delivered.* This dialogue then took place, according to McCabe (*Rec.*, 49):

LORD: "You were to give me a statement of the company."

MCCABE: "Why, I left it with the policy." (And so he did according to Lord's own testimony. *Rec.*, 102.) "I can get another one in five minutes over at the office."

LORD: "Well, all right. Have you got the Cable policy, too?"

MC CABE: "Yes, it is at the office."

LORD: "Well, bring that along, too, with a statement of the company, and I will pay you for both of them."

Lord's own story is that *he, himself, introduced the subject of the Cable policy by asking McCabe where it was;* and upon learning that it was at the office said:

> *"If you will go and get that policy and bring it to me I will pay for that policy and my policy—I will pay for Mr. Cable's policy and my own policy."* (*Rec.*, 103.)

It is undisputed that at this interview Lord was the one who first mentioned the Cable policy; that he made no reference of any kind to Cable's changed condition of health; and that McCabe, in entire ignorance of it, went back to Finney's office and got the Cable policy, which had been pigeon-holed there, and returned with it to Lord the same afternoon. McCabe handed it to Lord (or laid it in front of him upon his desk), saying as he did so or just afterwards: "Cable is all right, isn't he?" (*Rec.*, 50, 103.) Up to this point in the history of the transaction there was no conflict in the testimony, but conflict developed as to the precise language of Lord's reply to the foregoing question. McCabe testified that Lord replied: "The same as he has been for forty-eight hours," and that Lord then went on talking of other things, about the policy (*Rec.*, 50), and that Lord made the reply in such a low tone and in such a

casual manner that he, McCabe, paid no further attention to it, and in such a way that it conveyed to him the definite meaning that Cable was physically well and entitled to the policy according to its terms. (*Rec.*, 50, 51, 52.) McCabe further testified that he never had any information of any kind of Cable's illness. (*Rec.*, 56.) On the other hand, Lord testified on direct examination that his reply to the question asked by McCabe was: "No, Mr. Cable has been sick for two or three days, but is no worse than he has been for the last forty-eight hours." (*Rec.*, 103.) But on cross-examination he re-stated the reply, omitting the initial word "No" (*Rec.*, 106), and this was the form adopted by the master and the Circuit Court in the findings. Nothing further was said between Lord and McCabe on the subject of Cable's condition, and *the character of Lord's reply to McCabe's questions on the subject, is really the only controverted question of fact in the case from beginning to end.* (*Rec.*, 106.) Lord kept the Cable policy and paid McCabe in currency the premiums on both policies. (*Rec.*, 50.) McCabe states positively that neither at the time he delivered the policy to Lord, nor at any time before Cable's death, did he have any knowledge or any further information whatever of Cable's illness. (*Rec.*, 55, 56.) To impeach McCabe, generally, Miller testified that on or about March 3, 1899, McCabe narrated the "reply" to him (Miller), somewhat in accordance with Lord's version. (*Rec.*, 115.) And to impeach Lord, three witnesses, Maine, Bennett and Strong, testified that after Cable's death *Lord told them that on the morning of February 27, before he (Lord) had seen McCabe, he had learned that the policy had not been delivered to Cable, and had conferred with Cable's brother and one Moore respecting the advisability of obtaining de-*

livery, and that in this conference the three of them had agreed that Lord should get the policy from the insurance company if possible. (*Rec.*, 116-126.) Lord had previously denied making these declarations. (*Rec.*, 109-111.) Lord testified that during the week previous to Monday, February 27, he told Cable that he should probably accept his (the Lord) policy, whereupon Cable said: "You do with my policy whatever you do with your policy." (*Rec.*, 103.) This, the assumed agent's own statement, is the only evidence in the record of any authority on the part of Lord to take and pay for the Cable policy. Lord said that he used his own money to pay for the Cable policy (*Rec.*, 111), but kept no account of the disbursement upon his books, and made no claim for it against Cable's estate; and that it was finally refunded to him some time after Cable's death (he couldn't say when), by somebody (he couldn't say whom). (*Rec.*, 112, 113.)

On the evening of February 27 Lord took the policy to the Cable residence and handed it to some member of Cable's family (probably to Mrs. Cable, her mother, or to her sister or to Mr. Shaw, one of her counsel) (*Rec.*, 111), and after Cable's death it appeared in the possession of petitioner as administratrix. There is no evidence that Cable ever had knowledge of the delivery of the policy to Lord, or that he ever supposed that a contract of insurance with respondent existed in his favor. In the absence of evidence, we may well suppose that he would not have lent himself to such a transaction or scheme as that in which Lord engaged on February 27. It is perhaps significant that at the time of the death of Cable, *Lord was endorser on Cable's paper to the extent of* $45,000 *or* $50,000. (*Rec.*, 104.)

It has never been claimed that at the time of the delivery of the policy McCabe had any knowledge or information as to Cable's illness, except such as was afforded by Lord's controverted remark then made, or that any officer or agent of the insurance company had any such knowledge or information whatever prior to the death of Cable, unless, and only so far as, McCabe should be held to be an agent of the company.

* *
*

The material part of the body of the *policy* is as follows (*Rec.*, 9):

> "Number 94,082. Amount, $50,000.
>
> The United States Life Insurance Company in the City of New York, in *consideration of the application (hereby made part of this contract)* and of eight hundred forty-eight and fifty one-hundredths dollars paid on delivery hereof, and of a like sum payable on the 6th day of February in every year thereafter until ten years' premiums have been paid;
>
> Agrees, upon acceptance of satisfactory proofs of the death of Herman D. Cable (the insured) within the term of ten years ending on the 6th day of February, 1909, to pay *fifty thousand dollars in thirty consecutive annual installments of sixteen hundred sixty-six and sixty-six one-hundredths dollars each* to estate, or, if this policy be not assigned by the insured, to such other beneficiary as he may nominate to the company in writing, duly acknowledged; SUBJECT to the 'Benefits and Conditions' and 'Notice' on the succeeding pages hereof."

On the *back* of the policy under the title of "Benefits and Conditions" appears the following as Clause VIII:

> "When any installment hereunder is due the installments unpaid may be converted into their cash value, as shown in 'Table of Commuted Values' endorsed thereon."

Under the "Table of Commuted Values," referred to and endorsed on the policy (*Rec.*, 12), the commuted or cash value of the thirty unpaid installments under the policy in question is $30,000.

On the back of the policy under the title "Notice" it is provided:

> "Agents have no power to modify or change this contract, nor extend time for premium payment, nor waive forfeiture."

The *application* (*Rec.*, 11), signed by Cable, contains the following:

> "It is hereby declared and agreed, 1st, * * * that this application and declaration shall, with the policy herein applied for, and the benefits and condition, and notice contained therein, be the sole basis of the contract between me and the company, and shall be binding on all parties in interest under such policy; and that the policy to be issued hereon shall take effect *only upon* payment of the first premium and *delivery of the policy during* my lifetime, *sound health* and *insurable condition*. 2nd, that only the president, together with the secretary or the actuary, shall have the power to alter or waive the policy or *any condition* thereof."

In the form of application the applicant was specifically asked, among other things: "Have you ever been subject to or had . . . *pneumonia?*" and his response was: "No." It is contended on behalf of the respondent that this was a continuing inquiry and a continuing response until a binding contract of insurance should be made, or until the actual delivery of the policy.

Neither the policy nor the application contains any limitation of the time within which suit must be brought upon the policy.

* *
*

Allegations were made in the amended and supplemental bill to support the resort to the Federal court in equity as follows (*Rec.*, 19):

"9. Your orator is informed and believes, and therefore states the fact to be, that on or about the 16th day of March, 1899, the defendant, Alice A. Cable, was by the Probate Court of Cook County, Illinois, appointed administratrix of the estate of said Herman D. Cable, deceased, and that said policy, numbered 94,082, on the life of said Herman D. Cable is now in the possession of said administratrix. Said administratrix has filed with your orator proofs of the death of said Herman D. Cable, and has requested payment to her of the commuted value of the unpaid installments of one thousand six hundred sixty-six and sixty-six hundredths (1,666.66) dollars each specified in said policy, being the lump sum of thirty thousand (30,000) dollars; but your orator is informed and believes, and therefore states, that the said administratrix has no authority, without the direction of said Probate Court, to elect to receive the commuted value of such installments, and that no direction respecting such an election has been given to said administratrix by said Probate Court. Subsequent to the making of said request for the payment of said commuted value and in the morning of the same day in which your orator filed its original bill in this cause, said administratrix, through one of her attorneys, made a demand upon your orator, at its place of business in said City of New York, for the payment to her of the first installment of insurance money expressed to be payable in said policy, but your orator declined to comply with said demand and to make such payment. Thereupon, later in the forenoon of the same day, and about an hour or an hour and a half before the filing of your orator's said original bill, said administratrix began in the Superior Court of Cook County an action at law against your orator for the commuted amount of said policy of insurance laying the *ad damnum* at fifty-five thousand (55,000) dollars, and caused a summons to be issued in said action, which

summons, your orator states as supplemental matter to said original bill, was served upon said Strong, the agent of your orator, on the 15th day of May, 1899. And your orator further states as supplemental matter to said original bill that a summons out of this court upon said original bill was served upon said administratrix upon the same day in which said original bill was filed, *to wit, on the 11th day* of May, 1899.

10. Your orator further avers that the constitution and laws of the United States of America confer upon your orator the right to remove into this court said action at law so begun against your orator; that, on the other hand, the State of Illinois by legislative enactment has sought to prevent the removal to this court by insurance companies of actions similar to said action so begun by said administratrix, and has practically destroyed such right, or made its exercise impracticable, by providing, in substance, that an insurance company shall forfeit and lose its right to do business in the State of Illinois upon removing any such action into this court; that by removing said action to this court your orator might lose its right to transact business in the State of Illinois, and would certainly become involved in serious controversy with said state respecting the transaction of any subsequent business by your orator in said state; that the laws of said state upon certain questions of general insurance law, as interpreted by its highest legal tribunal, and applicable to the facts in this case are somewhat different from the laws of the United States, as interpreted by the Federal courts, upon the same questions, and, from the standpoint of the laws of the United States, are unduly and erroneously adverse to insurance companies; that your orator is entitled to an application of the law according to the decisions of the Federal courts; and that under the facts and circumstances hereinbefore set forth in this bill your orator is without a due and proper remedy at law in respect to the claim of said administratrix under said policy of insurance, but is without any remedy at law whatever in this court.

11. Your orator further avers that if it is correct in

its understanding as to the lack of authority on the part of said administratrix to make an election for the payment of the commuted amount expressed to be payable by said policy, said administratrix has no right at the present time to sue for anything further than the first installment expressed to be payable in said policy, and may at any time bring an action at law against your orator for said first installment; that on account of the number of cases pending at law in the courts of the State of Illinois, in said Cook County, and the established practice requiring contested actions (with a certain exception not material here) to be tried in the order of their commencement, a contested action at law cannot ordinarily be reached for trial in said state courts for more than a year after its commencement, and frequently for a much longer time; that your orator is liable to have an action at law for said first installment brought against it in one of said state courts at any time by said administratrix; that if said administratrix should hereafter bring such an action at law for said first installment in one of said state courts, a year or more would elapse in the natural course of things before it could be brought to trial; that before the termination of any such action for said first installment, another installment would be claimed to be due under said policy, and your orator would be liable to an action therefor; that in the event of a judgment adverse to your orator in any such action for the first installment, and of an appeal by your orator from such judgment to the Supreme Court of Illinois, several years would probably elapse before a final determination of the rights and obligations of your orator could be had, and, in the meantime, pending such final determination, subsequent installments would be claimed to be due, and your orator would be subject to successive and repeated actions for such accruing installments; that in the meantime, pending such final determination, and even pending the trial of said existing action at law, in the Superior Court of Cook County, your orator is liable to be deprived of the loss of important testimony in its behalf through the possible death of said McCabe, inas-

much as there is no provision of law in the State of Illinois under which the deposition of said McCabe may be taken before trial; and that said McCabe is the only witness by whom your orator can prove certain of the material facts hereinbefore set forth.

. . . . .

13. The premises considered, your orator avers that said policy of insurance upon the life of said Herman D. Cable, deceased, is not a valid and existing contract or obligation against your orator; that the possession of said policy by said administratrix, and her claim set up thereunder, constitute a wrong and injury to your orator for which your orator has no plain and adequate and complete remedy at law, and particularly has no such remedy in this court; that your orator is entitled to have said policy of insurance cancelled and surrendered to your orator; and that this court should take jurisdiction in the matter, should restrain said administratrix from prosecuting her said pending action at law, and from bringing or prosecuting any other action at law on said policy, and should decree that said policy be cancelled and surrendered to your orator."

The answer to these allegations was as follows (*Rec.*, 29-31):

"Defendant further admits that she filed with the complainant proofs of death of the said Herman D. Cable, and requested payment to her of the commuted value of the unpaid installments of said policy, being the sum of $30,000 as specified in said policy, and that said complainant refused and declined to pay the same; that thereupon she instituted suit in the Superior Court of Cook County, Illinois, against the complainant in an action at law for the commuted value of said policy, to wit, the sum of $30,000, and that such action was commenced some time prior to the filing of the original bill of complaint herein.

. . . . .

Defendant further answering says that she admits that before the complainant became entitled to do business in the State of Illinois it was required by the laws

of the State of Illinois to file with the Auditor of Public Accounts its written agreement to not remove or make application to remove, into the United States Court any action or proceeding commenced in any of the state courts of said state upon any claim or cause of action arising out of any business transaction in fact done in said state and that such complainant did file such written statement and was granted a license by said state to do business therein upon the basis of said agreement; and it is further provided by the laws of the State of Illinois that should the complainant fail to keep its said agreement, then the authorities of said state have the right to and it is made their duty to revoke the license of the complainant to further do business in the State of Illinois; but this defendant denies that the laws of the State of Illinois, upon the question involved in this suit as interpreted by its highest legal tribunal, are different from the laws as interpreted by the Federal courts upon the same question, or that the laws of the state as enforced by the courts of the State of Illinois are erroneously adverse to insurance companies, but says that the same rule governing the rights of the parties to this suit is enforced both by the Federal and state tribunals, and that the complainant is entitled to set up as its defense in the suit brought against it by this defendant in the state courts the matters alleged in its said amended and supplemental bill, and that all of its rights will be as fairly protected in said state court as in the Federal court.

Defendant further answering denies that she has no authority as administratrix to make an election for the payment of the commuted amount expressed to be payable in said policy, but says that she has such authority, having made such election, and that there is no danger to the complainant that any other suit will be instituted by her for the various installments as provided for in said policy, and she denies that the complainant is liable to be deprived of the loss of important testimony by the possible death of said McCabe; and further denies that the complainant will be able

to prove by said McCabe that said complainant had no knowledge of the illness of said Cable at the time of the delivery of the policy by him and his reception of the premium thereon.

Defendant further answering says that said contract is a valid and existing one, and that she is in possession of said policy as administratrix aforesaid, and that the complainant has an adequate and complete remedy at law by setting up in the suit brought by her the alleged facts set out in the amended and supplemental bill herein, and says that the allegations in the amended and supplemental bill of complaint as to the manner of the procurement of said policy are false and untrue, and denies that the complainant is entitled to have said policy of insurance cancelled and surrendered, and further says that this court should not take jurisdiction of this matter, or restrain the defendant from prosecuting the said pending action at law."

Material portions of the Illinois statute mentioned in the bill (Hurd's Rev. Stat. of Illinois, Chap. 73, title, "Insurance," paragraphs 31-33), are as follows:

"§ 1. *Be it Enacted by the People of the State of Illinois, represented in the General Assembly:* It shall not be lawful for any insurance company, association or partnership, incorporated by, or organized under the laws of any other state of the United States, or of any foreign government for the purpose of insuring against loss or damage by fire, or against the risks of inland navigation or transportation, or for the purpose of life insurance, or for the purpose of insuring persons against accidents, to take risks or to transact any business whatever, authorized by its charter within this state, until it shall have complied with the following requirements, in addition to those already imposed by existing law: It shall first file with the auditor of public accounts a written application for a license to do business in this state, duly signed by its president and secretary, with its corporate seal attached, which statement shall contain the following declarations: that it desires to transact the business of

insurance in this state; that it will accept a license therefor according to the laws of this state, and that said license shall cease and terminate in case, and whenever it shall remove or make application to remove into any United States court, any action or proceeding commenced in any of the state courts, *of this* state, upon any claim or cause of action arising out of any business transaction, in fact, done in this state; any permission, consent, agreement, condition or provision incorporated in any contract, mortgage, note, bond, obligation or policy of insurance authorizing or consenting to such removal, to the contrary notwithstanding.

"§ 2. Upon complying with the requirements of section one of this act, together with all other requirements now imposed by existing law, the auditor of public accounts shall issue to such incorporated company, association or partnership a license to transact its business in this state, and no such license shall be issued until all of said requirements shall have been complied with; and no such incorporated company, association or partnership shall carry on the business for which it may have been incorporated, within this state, until it shall have obtained such license: the fee for such license shall be the same as that provided for by existing law, to be paid by the incorporated company, association or partnership so securing such license.

"§ 3. If any such incorporated company, association or partnership shall remove, or make application to remove into any United States court any action or proceeding commenced in any state court of this state upon a claim or cause of action arising out of any business, or transaction in fact done in this state although there may have been a stipulation authorizing such removal, or if it shall violate, or fail to comply with, any of the other requirements or conditions now imposed by existing law, it is hereby made the imperative duty of the Auditor of Public Accounts, at once to remove, cancel and annul the license issued to such incorporated company, association or partnership; and thereafter no such incorporated company, association

or partnership shall transact within this state any business for which it was incorporated until again duly licensed. In case such revocation of license shall be made because of the removal of, or the attempt to remove any action from a state court of this state to *any United States* court, no renewal of such license shall be made within three years after such revocation. Whenever any such license shall be revoked, the auditor of public accounts shall give notice of such revocation by mail, to the president and secretary of such corporation, and shall also cause a notice of the same to be published three times in some weekly public newspaper, published in the City of Springfield. A certified copy of the order of removal shall be sufficient evidence of the removal of any cause."

The Supreme Court of Illinois seems impliedly to have upheld the foregoing statute in *People ex rel.* v. *Pavey, Auditor,* 151 Ill., 101, in which a petition for a writ of *mandamus* to compel the State Auditor to revoke, as he had refused to do, the license of an insurance company for removing an action against it from a state to a Federal court, was sustained on demurrer, without any discussion, or apparently any question being raised as to the validity of the enactment.

Subsequent legislation (see appendix to this brief) has now transferred the powers and duties of the State Auditor under the above statute to a Superintendent of Insurance.

Illinois statutory provisions relating to the "Administration of Estates" and pertinent here are found in certain sections of Chapter 3, Hurd's Rev. Stat. of Illinois, which read as follows:

"SEC. 83. Upon suggestion made by an executor or administrator to the County Court, that any claim, debt or demand, whatever, belonging to the estate in his hands to be administered, and accruing in the lifetime of the decedent, is desperate on account of the

insolvency or doubtful solvency of the person or persons owing the same, or on account of the debtor having availed himself of the bankrupt law of the United States, or on account of some legal or equitable defense which such person or persons may allege against the same, or for the cause that the smallness of such claim, debt or demand, and the difficulty of finding the debtors, owing to the remoteness of their residence, or such executor's or administrator's ignorance of the same, the said court may order such claim, debt or demand to be compounded or sold, or to be filed in the said court for the benefit of such of the heirs, devisees or creditors of such decedent as will sue for and recover the same, giving the creditors the preference, if they or any of them apply for the same before the final settlement of such estate: *Provided,* that no order for the sale or compounding of any such debts, claims or demands, or any of them, shall be made until two weeks public notice shall have been given, to all whom it may concern, of the time and place when the said order will be applied for—which notice shall be given by the administrator or executor in a newspaper published in the county where such application is to be made, or if no such newspaper is published in such county, then by posting up such notices in not less than three public places in the county, of which one shall be at the office of the clerk of the County Court—which notice shall be so posted at least two weeks previous to the time of said application. The executor or administrator shall report to the said County Court for its approval, the terms upon which he has settled or disposed of any such claim, debt or demand.

Sec. 85. The County Court may order claims, debts, and demands, due at so remote a period as to prevent their collection within the time required within the final settlement of estates, and the collection or disposition of which is necessary to the payment of the debts against the estate, to be compounded or sold in the same manner and upon like conditions as though such claims, debts or demands were desperate or doubtful: *Provided,* that no such claim, debt or demand shall

be sold or compounded for less than ten per cent. below the value thereof."

The foregoing sections were enacted in 1872. By subsequent enactment in 1877 all probate jurisdiction in Cook County was transferred from the County Court to the Probate Court of Cook County, which now exercises it.

* *
*

On page 2 of the brief of counsel for petitioner occur the following statements:

> "Finney was a life insurance broker, not regularly employed by any insurance company, but he had done business with the United States Life Insurance Company through its Chicago general agent for a number of years, and had procured insurance on the life of Cable in another company, which had lapsed in November, 1898. James F. McCabe was also an insurance agent or broker, and was requested, through Finney, to obtain applications for the United States Life Insurance Company. He, however, was not personally known to the Chicago general agent. Upon the delivery of the two policies to Finney, the gross amounts of the premiums were charged against him by the respondent's general agent, and he subsequently paid to such general agent the amount due on such premiums."

Because they bear upon the question—which, however, is not thought to be important, even if material—whether and how far any relation of agency existed on the part of McCabe and of Finney toward the complainant, the above statements seem to require notice. In no proper sense can it be said that Finney had been doing business *with the Insurance Company through* its Chicago agent. For a number of years his business had been purely that of a broker—had been merely bringing parties together. Finding certain persons willing to be insured, an insurance broker turns

over the insurance risks, for a consideration, to a regular agent of some company. That was his exact course in this case. Knowing that Cable and Lord would take insurance through him, he offered it to Strong without disclosing the names of the prospective applicants, made his arrangements with Strong for his own compensation, arranged with his employe McCabe to obtain the applications, and then turned over the entire matter to Strong, except that the policies, when written, were by Strong, handed to him for delivery and for collection of the first premiums, and he in turn handed them to McCabe for the same purpose. (*Rec.*, 69, 70, 79.)

Still less was there any direct relation on the part of McCabe toward the Insurance Company. The statement that he was "requested, *through* Finney," seems to imply that he was requested by the Insurance Company, or perhaps by Strong. This is not true. He was wholly in the employ of Finney, Strong had nothing whatever to do with him, and he had no business connection with the company or with Strong. (*Rec.*, 44, 74, 75, 82.)

The charging of the premiums against Finney, it should be explained, was merely the making of a memorandum against him upon a "tickler" and obviously for the purpose of preserving some kind of a record of the transaction. If complete delivery of either policy to the insured could be made by Finney, the agent would look to Finney for the premium. If delivery could not be made, Finney would return the policy and the charge would be cancelled by a proper credit. (*Rec.*, 75, 78.)

In this connection it is proper to notice a former contention of counsel for petitioner that, regarding Finney as *Cable's* agent, the charging by Strong against Finney of the

premium upon the Cable policy operated as a complete and final delivery of that policy, so that it took full effect upon February 21, three days before Cable became ill. This contention was made in the Circuit Court and in the Circuit Court of Appeals. It is now apparently abandoned, but it may possibly again make its appearance, and therefore the brief, simple and conclusive answer which can be made to it is here presented.

To meet any such contention it would perhaps be sufficient to refer the court to the answer to the bill, which not only fails to set up this supposed consummation of the insurance contract on February 21 as matter of defense, but on the contrary plainly takes the position that Cable had the right to reject the policy after that date; that there was to be no contract unless Cable accepted it, and that there was none in fact until Lord accepted it for him. But, irrespective of this, the question whether or not there was a consummated contract on the 21st of February depends, obviously, upon the intent or agreement of the parties. By the application the parties agreed that the policy should not take effect until delivery; and acceptance by Cable was essential to make a binding delivery.

Smith v. *Provident Savings Life Assurance Society*, 13 C. C. A., 284; 65 Fed., 765 (Sixth Circuit).

Equitable Life Assurance Society v. *McElroy*, 28 C. C. A., 365, 83 Fed., 631 Eighth Circuit).

Piedmont, etc., Life Assurance Co. v. *Ewing*, 92 U. S., 377.

Giddings v. *Ins. Co.*, 102 U. S., 108.

Markey v. *Mutual Benefit Life Ins. Co.*, 126 Mass., 158.

The application provided that the policy should not take effect until payment of the first premium, and that only the president, together with the secretary or the actuary, should have power to waive any condition of the policy, while the policy further provided that agents could not modify or change the contract, of which the application was made a part. There could be no delivery without payment, for Strong could not waive the effect of these limitations.

Davis v. *Mass. Mut. L. Ins. Co.*, 13 Blatch., 462; 7 Fed. Cas., 141, case 3,642.

Paine v. *Pacific Mut. L. Ins. Co.*, 2 C. C. A., 459; 51 Fed., 689 (Eighth Circuit).

United Firemen's Ins. Co. v. *Thomas*, 27 C. C. A., 42; 82 Fed., 406 (Seventh Circuit).

Kohen v. *Mut. Reserve Fund Life Ass'n*, 28 Fed., 705. (BREWER, J.)

Misselhorn v. *Mut. Reserve Fund Life Ass'n*, 30 Fed., 545. (BREWER, J.)

N. Y. Life Ins. Co. v. *Fletcher*, 117 U. S., 519, 530.

Northern Assurance Co. v. *Grand View Bldg. Ass'n*, 183 U. S., 308.

And even if Strong had authority to waive payment, the charge for the premium made by him against Finney February 21 would not be evidence of such a waiver, for it was not absolute; it was a mere memorandum placed upon a "tickler," and was subject to cancellation upon return of the policy undelivered. (*Rec.*, 75, 78.)

But it further appears that when Finney, through McCabe, tendered the policy to Cable, the latter himself *declined to accept it*, and that he *afterwards* referred to Lord

the question of acceptance or rejection; and there was apparently an express understanding that Cable was not obliged to take the policy until acceptance after examination. (*Rec.*, 102.) These facts wholly destroy any reasonable basis for a contention that the manual tradition of the policy to Finney and the making of the "tickler" memorandum operated to put the insurance in force on February 21.

POINTS.

UPON THE JURISDICTIONAL QUESTION.

Respondent's contention is that the equitable jurisdiction of the Circuit Court of the United States was properly invoked and exercised, under the special circumstances of this case, because respondent did not have a plain, adequate, and complete remedy at law as such remedy is understood in the Federal courts.

I.

RESPONDENT DID NOT HAVE A PLAIN, ADEQUATE, AND COMPLETE REMEDY AT LAW IN THE FEDERAL COURT. IT COULD NOT ITSELF INSTITUTE ANY LEGAL PROCEEDING THERE, NOR COULD IT FREELY REMOVE TO THAT COURT ANY LEGAL PROCEEDING BROUGHT AGAINST IT IN THE STATE COURT. ITS CONSTITUTIONAL RIGHT TO HAVE, THROUGH REMOVAL, ANY CONTROVERSY AT LAW WITH PETITIONER ADJUDICATED IN A FEDERAL COURT HAD BEEN HAMPERED, EMBARRASSED, AND PRACTICALLY DESTROYED BY AN ILLINOIS STATUTE. THE REMEDY AT LAW WHICH IS A BAR TO EQUITABLE RELIEF IN A FEDERAL COURT MUST EXIST ON THE LAW SIDE OF THE SAME COURT.

Repeated decisions of this court and of other courts have defined what is meant by a "plain, adequate, and complete" remedy at law.

It is a remedy "equally effectual with the equitable remedy as to all the rights of the complainant" and "as practical and efficient to the ends of justice and its prompt administration."

Lewis v. *Cocks*, 23 Wall., 466, 470.

It is a remedy which, "both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

Kilbourn v. *Sunderland,* 130 U. S., 505, 514-5.

It is a remedy which may be resorted to without impediment.

Root v. *Railway Co.,* 105 U. S., 189, 216.

It is a remedy whose assertion is not liable to be "attended by the imposition of heavy penalties and forfeitures."

Pacific Express Co. v. *Seibert,* 44 Fed., 310, 315.

It is a remedy that is not "attended with a great and oppressive burden of risk," and whose adequacy does not "depend upon the will of the opposing party."

Bank of Kentucky v. *Stone,* 88 Fed., 383, 391 (*per* Judge TAFT, in the Circuit Court, with whom sat and concurred Mr. Justice HARLAN and Judge LURTON).

It is a remedy which is not doubtful or speculative.

Davis v. *Wakelee,* 156 U. S., 680, 688.

Whether such a remedy exists in any case must be determined by the particular circumstances of that case.

Watson v. *Sutherland,* 5 Wall., 74, 79.

Rich v. *Braxton,* 158 U. S., 375, 406.

To similar effect are

Boyce's Executors v. *Grundy*, 3 Pet., 210, 215.

Sullivan v. *Portland, etc., R. R. Co.*, 94 U. S., 806, 811.

Drexel v. *Berney*, 122 U. S., 241, 252.

Gormley v. *Clark*, 134 U. S., 338, 349.

Allen v. *Hanks*, 136 U. S., 300, 311.

Tyler v. *Savage*, 143 U. S., 79, 95.

Walla Walla v., *Walla Walla Water Co.*, 172 U. S., 1, 12.

Smith v. *American Nat. Bank*, 32 C. C. A., 368, 376; 89 Fed., 832.

Pacific Express Co. v. *Seibert*, 44 Fed., 310, 315.

The Illinois statute against removals is doubtless repugnant to the Federal Constitution and void, along with the agreement not to remove required by it.

Barron v. *Burnside*, 121 U. S., 186.

Southern Pacific Co. v. *Denton*, 146 U. S., 202, 207.

Galveston, etc., Railway v. *Gonzales*, 151 U. S., 496, 502.

Barrow Steamship Co. v. *Kane*, 170 U. S., 100, 111.

Blake v. *McClung*, 172 U. S., 239, 255.

Chattanooga R. & C. R. Co. v. *Evans*, 14 C. C. A., 116, 120; 66 Fed., 809, 814.

Metropolitan L. Ins. Co. v. *M'Nall*, 81 Fed., 888.

Mut. L. Ins. Co. of N. Y. v. *Boyle*, 82 Fed., 705.

Commonwealth v. *E. Tenn. Coal Co.*, 30 S. W., 608 (Kentucky).

Commonwealth v. *Jellico Coal Min. Co.*, 30 S. W., 611 (Kentucky).

See, also,

Dayton Coal & Iron Co. v. *Barton*, 183 U. S., 24, 25.

Doubtless respondent might, upon learning of the action at law brought against it, have abandoned its bill and removed the action at law to the Federal court, but that course would have been fraught with danger, for a controversy with the State Superintendent of Insurance, and an attempted revocation of respondent's license, would have been certain to follow. As admitted by the answer of petitioner (*Rec.*, 30), whose counsel even now argue (page 17 of their brief) in favor of the validity and effectiveness of the statute, it would have been the duty of the state authorities under the statute to revoke respondent's license in case it attempted a removal of the action at law to the Federal court. The existence of the statute and the attitude of the state authorities with respect to it were a menace to respondent, made its right of removal valueless, and deprived it of its plain, adequate, and complete remedy at law.

Lewis v. *Cocks*, 23 Wall., 466, 470.

Root v. *Railway Co.*, 105 U. S., 189, 216.

Kilbourn v. *Sunderland*, 130 U. S., 505, 514-5.

Smith v. *Am. Nat. Bank*, 32 C. C. A., 368, 376; 89 Fed., 832.

Pacific Express Co. v. *Seibert*, 44 Fed., 310, 315.

Bank of Kentucky v. *Stone*, 88 Fed., 383, 391.

As respondent did not have the proper remedy at law in the Federal court, it is immaterial whether respondent had such a remedy in a state court. The equitable jurisdiction of the Federal courts does not depend, and cannot be made to depend, upon the adequacy of proceedings at law in the state courts.

Bean v. *Smith*, 2 Mason, 252; 2 Fed Cas., 1143, 1150, case 1174 (*per* Mr. Justice STORY).

Breeden v. *Lee*, 2 Hughes, 484; 4 Fed. Cas., 50, case 1828.

Mayer v. *Foulkrod*, 4 Wash. Circ. Ct., 349; 16 Fed. Cas., 1231; case 9341 (*per* Mr. Justice WASHINGTON, sitting with PETERS, J.).

Coler v. *Board of Commissioners*, 89 Fed., 257.

Niagara Fire Ins. Co. v. *Cornell*, 110 Fed., 816, 820.

Nat. Surety Co. v. *State Bank*,—— C. C. A., ——; 120 Fed., 593, 602.

Mississippi Mills v. *Cohn*, 150 U. S., 202, 205-206.

Smyth v. *Ames*, 169 U. S., 466, 516.

See, also,

Stanton v. *Embry*, 46 Conn., 595.

Jurisdiction and procedure of the Federal courts cannot be made to depend upon, nor be controlled by, state legislation and state procedure; otherwise state legislation, by extending *legal* remedies, might destroy all equitable jurisdiction on the part of Federal courts. The jurisdiction and procedure in the Federal courts of law and of equity depend

upon essential principles and distinctions as understood and applied by the Federal courts themselves.

Bean v. *Smith*, 2 Mason, 252; 2 Fed. Cas., 1143, case 1174.

Mayer v. *Foulkrod*, 4 Wash. Circ. Ct., 349; 16 Fed. Cas., 1231, case 9341.

Robinson v. *Campbell*, 3 Wheat., 212, 222.

Mississippi Mills v. *Cohn*, 150 U. S., 202, 205, 206.

Smyth v. *Ames*, 169 U. S., 466, 516.

II.

NOR IF THAT WERE MATERIAL DID RESPONDENT HAVE A PLAIN, ADEQUATE AND COMPLETE REMEDY IN THE STATE COURTS OF ILLINOIS, BECAUSE IT COULD NOT HAVE ITS CONTROVERSY WITH PETITIONER PROPERLY DECIDED THERE IN ACCORDANCE WITH CORRECT PRINCIPLES OF GENERAL INSURANCE LAW AS UNDERSTOOD AND APPLIED BY THIS COURT, AND BECAUSE IT MIGHT NOT HAVE BEEN ABLE TO INTERPOSE IN AN ACTION AT LAW THE DEFENSE THAT THE POLICY HAD BEEN PROCURED BY FRAUD. THIS SHOWS THE PECULIAR VALUE OF THE RIGHT TO BE IN THE FEDERAL COURT.

The substantial questions involved are questions of general law upon which the Federal courts exercise their own judgment, independently of state decisions.

Carpenter v. *The Providence Washington Ins. Co.*, 16 Peters, 495, 511.

Burgess v. *Seligman*, 107 U. S., 20, 33-34.

B. & O. R. R. Co. v. *Baugh*, 149 U. S., 368.

Gloucester Ins. Co. v. *Younger*, 2 Cur., 338; 10 Fed. Cas., 495, 500, case 5487, *per* Mr. Justice CURTIS.

Maier v. *Fidelity Mut. Life Ass'n.*, 24 C. C. A., 239; 78 Fed., 566, 572. (Opinion by Mr. Justice HARLAN.)

Washburn & Moen Mfg. Co. v. *Reliance Marine Ins. Co.*, 27 C. C. A., 134; 82 Fed., 296.

This court must consider its views of the principles of general insurance law to be sound, and any contrary views of other courts to be erroneous. It logically follows that if the views of the Supreme Court of Illinois, in applying such principles, differ from those of this court, any supposed remedy to respondent founded upon such different and erroneous views would not be an adequate remedy, but would in fact be no remedy at all. This court and the Supreme Court of Illinois appear to differ radically. One or the other must be wrong, and if the Illinois Supreme Court is wrong, then respondent could have had no remedy at all in the State court from the standpoint of this court.

See,

Bean v. *Smith*, 2 Mason, 252; 2 Fed. Cas. 1143, 1150, case 1174.

It is settled in this court that a mere solicitor or a local agent of a life insurance company cannot bind his company, affirmatively or by waiver, through his agreements or knowledge, when plain and appropriate limitations and restrictions upon his authority are brought to the attention of an applicant for insurance by being embodied in the application.

Davis v. *Mass. Mut. L. Ins. Co.*, 13 Blatch., 462; 7 Fed. Cas., 141, case 3,642.

Paine v. *Pacific Mut. L. Ins. Co.*, 2 C. C. A., 459; 51 Fed., 689.

United Firemen's Ins. Co. v. *Thomas*, 27 C. C. A., 42; 82 Fed., 406.

Kohen v. *Mut. Reserve Fund Life Ass'n*, 28 Fed., 705. (BREWER, J.)

Misselhorn v. *Mut. Reserve Fund Life Ass'n*, 30 Fed., 545. (BREWER, J.)

N. Y. Life Ins. Co. v. *Fletcher*, 117 U. S., 519, 530.

Northern Assurance Co. v. *Grand View Bldg. Ass'n*, 183 U. S., 308.

The Supreme Court of Illinois holds that *any person* who receives applications for life insurance, collects premiums, and delivers policies is authorized to waive a limitation or restriction upon his own authority contained in a policy or in an application, and to waive other provisions of the contract, and to bind the company by agreement or waiver in connection with the act of manual delivery, without regard to the expressed limitations or restrictions; and that court has expressly indicated a disinclination to accept the rule enunciated in the *Fletcher* case, 117 U. S., and repeated in the *Grand View Bldg. Association* case, 183 U. S.

John Hancock Mutual Life Ins. Co. v. *Schlink*, 175 Ill., 284, 289-90.

Royal Neighbors of America v. *Boman*, 177 Ill., 27, 31.

Under a recent decision of the Supreme Court of Illinois question exists whether the defense of fraud in procuring an insurance policy, not affecting its manual execution, can be made available in an action at law, or can only be made available in a suit in equity to cancel the policy.

Robinson v. *Sharp*, 201 Ill., 86; 66 N. E., 299.

The remedy of respondent in a State court of Illinois is, therefore, very far from being "plain" and "adequate" at law.

III.

THERE HAD BEEN NO FINAL AND CONCLUSIVE ELECTION TO TAKE THE COMMUTED VALUE OF THE POLICY, AND THE POSSIBILITY OF A MULTIPLICITY OF SUITS, OR NUMBER OF SUCCESSIVE SUITS, AGAINST RESPONDENT FOR SEPARATE ANNUAL INSTALMENTS UNDER THE POLICY WAS ADDITIONAL GROUND FOR INVOKING THE JURISDICTION OF A COURT OF EQUITY.

Illinois Statutory Provisions concerning the "Administration of Estates," *supra.*

Washington v. *L. & N. Ry. Co.*, 136 Ill., 49, 56.

And

Boyce's Executors v. *Grundy*, 3 Pet., 210, 215.

Buzard v. *Houston*, 119 U. S., 347, 352.

Bank of Kentucky v. *Stone*, 88 Fed., 383, 392.

Town of Springport v. *Teutonia Sav. Bank*, 75 N. Y., 397.

IV.

RESORT TO EQUITY WAS FURTHER SUSTAINABLE ON THE GROUND THAT RESPONDENT MIGHT LOSE IMPORTANT EVIDENCE, NAMELY, THE TESTIMONY OF THE WITNESS M'CABE, THROUGH LAPSE OF TIME.

Boyce's Executors v. *Grundy*, 3 Pet., 210, 215.

Schmidt v. *West*, 104 Fed., 272.

Fuller v. *Percival*, 126 Mass., 381.

2 Story's Eq. Juris., § 700.

V.

UNDER THE CIRCUMSTANCES THE DISCRETIONARY JURISDICTION OF A COURT OF EQUITY TO CANCEL AN INSTRUMENT OBTAINED BY FRAUD WAS PROPERLY EXERCISED.

2 Joyce on Insurance, §§ 1674-80.

2 May on Ins., § 573.

2 Story's Eq. Juris., §§ 693, 700.

Pomeroy's Eq. Juris., § 912.

Bromley v. *Holland,* as reported in Coop., 9, 21.

The Prince of Wales, etc., Ass'n Co. v. *Palmer,* 25 Beav., 605.

British Equitable Assur. Co. v. *Great Western Ry. Co.,* 20 Law T., 422; s. c., 38 L. J. (1869), N. S., 132, 314.

Mutual Life Ins. Co. v. *Pearson,* 114 Fed., 395 (later than this Cable case).

Union Life Ins. Co. v. *Riggs,* 123 Fed., 312 (later than this Cable case).

See, also, the following cases cited in the brief for petitioner:

Insurance Co. v. *Bailey,* 13 Wall., 616.

Life Ins. Co. v. *Bangs,* 103 U. S., 780.

Home Ins. Co. v. *Stanchfield,* 1 Dill., 424; 2 Abb. U. S., 1; 12 Fed Cas., 449, case 6,660.

VI.

THE POWER OF THE FEDERAL COURT TO TAKE JURISDICTION OF THE CASE AND THE PROPRIETY OF ITS DOING SO WERE NOT AFFECTED BY THE COMMENCEMENT OF PETITIONER'S ACTION AT LAW IN THE STATE COURT, NOR BY THE PRAYER FOR AN INJUNCTION, WHICH WAS NOT TAKEN BY THE FINAL DECREE.

There was neither actual nor attempted injunction of state court *proceedings*. The original restraining order was sought against a *party*, and was properly issued; but the final decree contains no injunction at all, though the Federal court would have had power to order it.

French v. *Hay*, 22 Wall., 250.

Arrowsmith v. *Gleason*, 129 U. S., 86, 98-101.

Marshall v. *Holmes*, 141 U. S., 589, 599-600.

Nat. Surety Co. v. *State Bank*, — C. C. A., —; 120 Fed., 593.

Service of process was first had in the equity suit and gave the respondent the better right to proceed, if there were any question of priority involved. But there is no such question in the case, which shows two different suits, for different objects, proceeding, and capable of proceeding, concurrently in two different jurisdictions, the first judgment controlling if properly set up in the other proceeding.

Buck v. *Colbath*, 3 Wall., 334, 345-6.

Stanton v. *Embrey*, 93 U. S., 548, 553-4.

Ins. Co. v. *Brune's Assignee,* 96 U. S., 588, 592-3.

Gordon v. *Gilfoil,* 99 U. S., 168, 172, 178.

How widely it is understood in the Federal courts that concurrent suits may proceed in different jurisdictions, the following cases attest:

Gates v. *Bucki,* 4 C. C. A., 116; 53 Fed., 961, 965.

Short v. *Hepburn,* 21 C. C. A., 252; 75 Fed., 113.

Appleton Water Works v. *Central Trust Co.,* 35 C. C. A., 302, 305; 93 Fed., 286, 289.

Ogden City v. *Weaver,* 47 C. C. A., 485; 108 Fed., 564, 568.

Nat. Foundry & Pipe Works v. *Oconto City Water Supply Co.,* 51 C. C. A., 465; 113 Fed., 793, 800.

Martin v. *Baldwin,* 19 Fed., 340, 341.

Hurst v. *Everett,* 21 Fed., 218, 220.

Sharon v. *Hill,* 22 Fed., 28.

Lehman v. *Rosengarten,* 23 Fed., 642.

Hospes v. *O'Brien,* 24 Fed., 145, 146.

Ball v. *Tompkins,* 41 Fed., 486, 490.

Gilmour v. *Ewing,* 50 Fed., 656, 658.

First Nat. Bank v. *Duel Co.,* 74 Fed., 373, 374-5.

Bank of Kentucky v. *Stone,* 88 Fed., 383, 398.

The recent case of *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.,* cited on behalf of petitioner in the Circuit Court of Appeals, also in the brief supporting the petition for the issuance of the

writ of *certiorari* (p. 9), has no application. The universally accepted doctrine of that case refers only to proceedings *in rem,* or affecting the possession of property, while the state court proceeding in this instance was only an action at law.

Farmers' Loan & Trust Co. v. *Lake Street El. R. R. Co.,* 177 U. S., 51, 60-61.

UPON THE MERITS.

Respondent contends that this case was correctly decided upon the merits because:

VII.

LORD'S REPLY TO M'CABE AT THE TIME THE POLICY WAS ACTUALLY DELIVERED DID NOT CONSTITUTE A SUFFICIENT DISCLOSURE TO M'CABE, WHETHER THE TESTIMONY OF LORD OR OF M'CABE BE ACCEPTED AS TRUE. THERE WAS A CONCEALMENT OF MATERIAL FACTS AND THIS WAS IN ITSELF FRAUD VITIATING THE POLICY.

1 May on Ins., §§ 190, 209, 212.

1 Joyce on Ins., § 643.

2 Joyce on Ins., §§ 1844-49, 1855, 1869.

1 Story Eq. Jur., §§ 215 & 216.

M'Lanahan v. *Universal Ins. Co.,* 1 Pet., 170, 184-5.

Piedmont, etc., Life Ins. Co. v. *Ewing,* 92 U. S., 377.

Sun Mut. Ins. Co. v. *Ocean Ins. Co.,* 107 U. S., 485, 510.

Equitable Life Assurance Co. v. *McElroy,* 28 C. C. A., 365; 83 Fed., 631.

Manhattan Life Ins. Co. v. *Carder*, 27 C. C. A., 344; 82 Fed., 986.

Barnes v. *Fidelity Mut. Life Ins. Assn.*, 43 Atl., 341 (Penn.), (a pneumonia case).

Life Ins. Clearing Co. v. *Bullock*, 33 C. C. A., 365; 91 Fed., 487.

Ely v. *Hallett*, 2 Caines (N. Y.), 57.

And her defense being by way of confession and avoidance it was incumbent upon petitioner to show a full disclosure affirmatively.

Underhill on Evidence, § 250.

Elkin v. *Jansen*, 13 M. & W., 655.

Carroll v. *Malone*, 28 Ala., 521.

VIII.

NEITHER THE DISCLOSURE PRETENDED NOR ANY DISCLOSURE COULD HAVE AFFECTED THE COMPANY BECAUSE OF THE CIRCUMSTANCES SURROUNDING THE DELIVERY OF THE POLICY, THE CONDITIONS THEREIN, AND IN THE APPLICATION, AND THE LIMITATIONS UPON M'CABE'S AUTHORITY, OF ALL WHICH CABLE AND LORD WERE COGNIZANT OR ARE CONCLUSIVELY PRESUMED TO HAVE BEEN COGNIZANT.

Insurance Co. v. *Lyman*, 15 Wall., 664.

Insurance Co. v. *Wolff*, 95 U. S., 326.

Insurance Co. v. *Mowry*, 96 U. S., 544.

Thompson v. *Insurance Co.*, 104 U. S., 252, 259.

Insurance Co. v. *Fletcher*, 117 U. S., 519.

Northern Assurance Co. v. *Grand View Bldg. Ass'n*, 183 U. S., 308.

Paine v. *Pacific Mut. Life Ins. Co.*, 2 C. C. A., 459; 51 Fed., 689.

Union Nat. Bank v. *German Ins. Co.*, 18 C. C. A., 203; 71 Fed., 473.

Maier v. *Fidelity Mut. Life Ass'n*, 24 C. C. A., 239; 78 Fed., 566.

United Firemen's Ins. Co. v. *Thomas*, 27 C. C. A., 42; 82 Fed., 406.

S. C., on rehearing, 34 C. C. A., 240; 92 Fed., 127.

U. S. Life Ins. Co. v. *Smith*, 34 C. C. A., 506; 92 Fed., 503.

Davis v. *Mass. Mut. Life Ins. Co.*, 13 Blatch., 462; 7 Fed. Cas., 141, case 3,642.

Lee v. *Guardian Life Ins. Co.*, 5 Ins. L. Jour., 26; 5 Bigelow Ins. Cas., 18; 15 Fed. Cas., 158, case 8,190.

Even if McCabe's testimony were wholly untrue and Lord had made a full disclosure to McCabe, and McCabe for his own purposes co-operated with Lord in the perpetration of a fraud upon the respondent, the petitioner could derive no benefit therefrom.

New York Life Ins. Co. v. *Fletcher*, 117 U. S., 519, 529.

Northern Assurance Co. v. *Grand View Bldg. Ass'n*, 183 U. S., 308.

Maier v. *Fidelity Mut. Life Ass'n*, 24 C. C. A., 239; 78 Fed., 566.

U. S. Life Ins. Co. v. *Smith*, 34 C. C. A., 506; 92 Fed., 503.

National Life Ins. Co. v. *Minch*, 53 N. Y., 144.

Ryan v. *World Mutual Life Ins. Co.*, 41 Conn., 168, 172.

IX.

AS THERE WAS NO SUBSTANTIAL OR MATERIAL FACT IN CONTROVERSY, NOTHING COULD PROPERLY HAVE BEEN SUBMITTED TO A JURY IF AN ACTION AT LAW HAD BEEN INSTITUTED IN THE FEDERAL COURT. IT WOULD HAVE BEEN PROPER TO DIRECT A VERDICT FOR RESPONDENT UPON A TRIAL AT LAW.

Pleasants v. *Fant*, 22 Wall., 116.

Hendrick v. *Lindsay et al.*, 93 U. S., 143.

Oscanyan v. *Arms Co.*, 103 U. S., 261.

People's Savings Bank v. *Bates*, 120 U. S., 556.

X.

THERE HAVING BEEN NO ABUSE OR IMPROPER EXERCISE OF DISCRETION IN TAKING JURISDICTION, AND THE CASE HAVING BEEN CORRECTLY DECIDED UPON THE MERITS, THIS COURT, FOLLOWING ITS UNIFORM PRACTICE, SHOULD NOT DISTURB THE DECREE.

Allis v. *Ins. Co.*, 97 U. S., 144.

Lancaster v. *Collins*, 115 U. S., 222, 227.

Rice v. *Edwards*, 131 U. S., clxxv, clxxvii.

Mo. Pac. Ry. Co. v. *Fitzgerald*, 160 U. S., 556, 579-80.

ARGUMENT.

It is not proposed to submit full printed argument covering all the points presented by the record. Most of them need no argument at all, but the convenience of the court will no doubt be promoted by a discussion of some of them, and by further reference to certain of the cases above cited.

THE QUESTION OF JURISDICTION.

It goes without saying that if respondent had a plain, adequate, and complete remedy at law the resort to equity could not be sustained. The Judiciary Act would stand in that event as an insuperable obstacle, as, indeed, would the settled principles of equity jurisprudence without the statute. The statute merely affirms those principles, under which equity gives relief in this class of cases, in the discretion of the court, when it can see that there is no plain, adequate and complete remedy at law. The essential and fundamental question involved, is, therefore, whether the respondent had such a remedy at law for the fraud shown, and not whether the fraud of itself was sufficient basis for invoking equitable jurisdiction. There can be no difference between counsel on this proposition.

Insurance Company v. *Bailey*, 13 Wall., 616, and *Home Insurance Company* v. *Stanchfield*, 1 Dill., 424; 2 Abb. U. S., 1; 12 Fed. Cas., 449, case 6,660, seem to be the substantial reliance of counsel for petitioner in attacking the jurisdiction of the Circuit Court. Careful examination of those cases will disclose that they do not justify the confidence of counsel. On the contrary, they are believed to

have little or no application,—certainly no application adverse to respondent,—upon this record.

The case of *Aetna Life Ins. Co.* v. *Smith*, 73 Fed., 318, cited by counsel for petitioner, merely follows the *Bailey* case, and requires no attention here.

In the *Stanchfield* case, heard at circuit before Judge DILLON and Mr. Justice MILLER, action was brought upon a fire insurance policy after loss had occurred, and Judge DILLON, in delivering the opinion of the court, said that the question for determination was whether such a bill was maintainable "when the fraud alleged as a ground for the cancellation of the policy is available to the company as a defense to an action on the policy, and constitutes, if proved, a complete defense thereto." (12 Fed. Cas., p. 450.) It will be observed that the decision was thus predicated upon the assumption that the complainant had a plain, adequate and complete remedy at law. This is even more apparent from the following subsequent portions of the opinion, in which Mr. Justice MILLER concurred:

> "It is our opinion that the present bill sets forth no sufficient grounds for equitable interference, and we now proceed to state the reasons on which this opinion rests. No principle is more familiar than the one that where the law affords a full, complete, and adequate remedy, equity will not interfere. . . . In other words, the parties must litigate in the law courts unless there are good or legal reasons for invoking the aid of equity. This principle or rule must have full effect given to it in the courts of the Union, for it is recognized by the Constitution and by the Judiciary Act. . . . In the case before us no reason is set forth in the bill showing that the Insurance Company needs the aid of a court of equity to relieve itself of liability on the policy. . . . If the facts averred in the bill are true, they constitute a complete defense

to such an action, *and nothing is set forth showing that any obstacles stand in the way of making this defense at law.* . . . If no *hardship, no injustice,* will result and *no reason appears* for not leaving the parties to their rights and remedies at law, equity will leave them there. Now, it is well settled, to use the language of Mr. Justice Story, that an application to equity to have 'instruments canceled or delivered up is not, strictly speaking, a matter of right, . . . but of sound discretion, to be exercised by the court, either in granting or refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case.' 2 *Story, Eq. Jur.,* § 693.

Chancellor Kent, in holding that a court of equity had full power to order instruments to be delivered up, whether void, or not, at law, and even if void on their face, after reviewing some of the leading English cases, says: 'But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps,' he adds, 'the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, *may be difficult or uncertain at law,* or *from some other special circumstances* peculiar to the case and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation.' *Hamilton* v. *Cummings,* 1 Johns. Ch., 517, 523, referred to by Marshall, C. J., in *Peirsoll* v. *Elliott,* 6 Pet., 95.

Applying these principles to the present case, we need not deny that equity has jurisdiction by reason of the fraud alleged, to entertain the suit, but are of the opinion that it is inexpedient to exercise it under the case made by the bill. To leave the parties at law seems a

more reasonable and proper exercise of the discretion which the court has in bills to cancel contracts, than to retain the bill and exercise the authority asked. Because: (1) The company has a full, plain and perfect defense to the policy, at law, and no reason is shown why a resort to equity is either necessary, expedient, or proper. (2) Action at law on the policy must (as we have seen) be brought in a short, limited time after the loss."

Of the *Bailey* case, the Circuit Court of Appeals said (See Appendix; also 39 C. C. A., 269; 98 Fed., 767):

"The case was heard in the Circuit Court upon the merits, and the bill dismissed, because it appeared that an action at law was then pending in the same court upon the law side, and that the remedy which the complainant could avail himself of there would be adequate; and the Supreme Court affirmed the decree. What the court held was that although equity had power to order the delivery up and cancellation of a policy of insurance obtained on fraudulent representations and suppressions of facts, yet it will not *generally* do so when these representations and suppressions can be *perfectly well* used as a defense at law in a suit upon the policy. Here the suit at law was pending in the same court. There was no invitation to the plaintiff to go into another jurisdiction to seek an adjudication of his rights. *The point was not raised nor adjudicated as to whether a remedy at law could be adequate and as effectual as the remedy in equity, where the complainant had not the remedy under his own control.* In the recent case of *Bank* v. *Stone* (C. C.), 88 Fed., 383, heard before Mr. Justice HARLAN, sitting with the two Circuit Judges, this question seems to have been adjudicated."

The opinion in the *Bailey* case, referring to an earlier decision, said (p. 621):

"Much consideration was given to the construction of that section of the Judiciary Act in the case first referred to, and also to the question whether a party

seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court, without hesitation, came to the conclusion that he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must *in general* proceed at law, because the defendant, under such circumstances, has a right to a trial by jury.

. . . . .

The rule in the Federal courts is universal, that if the defendant has a good defense at law, and the remedy at law is as perfect and complete as the remedy in equity, an injunction will not be granted.

. . . . .

Where a party, if his theory of the controversy is correct, has a good defense at law to 'a purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, *unless he is prepared to allege and prove some special circumstances* to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending *in the court whose decree is under re-examination.*"

In the *Stanchfield* case it appeared that under an express provision of the policy an action was required to be brought

upon it within twelve months after the occurrence of loss, and that about five months had already passed. In the *Bailey* case an action at law was already pending in the Federal court. In the present case under review there is no specified limitation of time within which an action must be begun upon the policy, and no action has ever been begun upon it in the Federal court.

The decisions of the English courts in respect to the jurisdiction of equity in suits of this general character are set forth in 2 Pomeroy's Equity Jurisprudence, Sec. 912, where it is said:

> "The doctrine is fully settled by an unbroken line of decisions extending to the present day, that with one remarkable exception (*i. e.*, fraudulent bills. See *Sec.* 913) the jurisdiction of equity exists in and may be extended over *every* case of fraud, whether the primary rights of the parties are legal or equitable, and whether the remedies sought are equitable or simple pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case and can administer the same kind of relief. The English judges have virtually said that in every case of fraud the remedy at law, either from the nature of the legal relief itself or from the methods of legal procedure, is inadequate. The only question, therefore, presented to an English court, is, not whether the equitable jurisdiction *exists*, but whether it should be exercised. As the ablest judges have often said, one of the occasions for the existence of a separate court of chancery was its power to deal with all cases of fraud; its original grant of jurisdiction covered fraud in all its forms and phases. The law courts, on the other hand, originally had very little, if any, jurisdiction in such matters. In the early forms of action to enforce covenants, debts and other obligations, *ex contractu*, fraud was not admitted as a defense; and there was no form of action appropriate for the recovery of damages on account of fraud. The jurisdiction of

the law courts in such cases was of later origin, and was of gradual growth. It was not until the invention of the actions of assumpsit, case, and trover, in which equitable principles could be largely admitted, that the jurisdiction at law in matters of fraud became fully developed. The full jurisdiction of equity having thus been established from the earliest time, it should not, in accordance with familiar principles, be at all affected by a subsequent growth of a similar common law jurisdiction. To say that the full jurisdiction of equity has been any way abridged, impaired or altered, because the law courts have gradually assumed and finally acquired a like jurisdiction, even though competent in many cases to administer adequate relief, is to violate one of the most fundamental principles regulating the general equitable jurisdiction. The sum of the English doctrine, therefore, is that although the jurisdiction always *exists*, whether it will be exercised depends upon the circumstances of individual cases."

Reference may also be made on the general subject to

2 Story's Eq. Juris., §§ 693, 700.

2 Joyce on Insurance, §§ 1674-80.

2 May on Insurance, § 573.

That the remedy at law to defeat resort to equity must be *in the same jurisdiction* has been clearly enough decided by this court, and the question is apparently regarded as settled in the lower Federal courts.

In the leading case of *Smyth* v. *Ames*, 169 U. S., 466, it was held, the court speaking by Mr. Justice HARLAN (p. 516):

"One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he *cannot be deprived of that right by reason of his being allowed to sue at law in a state court* on the same cause of action."

In *Bean* v. *Smith*, 2 Mason, 252; 2 Fed. Cas., 1143, case 1,174, Mr. Justice STORY in the circuit court expressed a like view.

In *Mayer* v. *Foulkrod*, 4 Wash. Circ. Ct., 349; 16 Fed. Cas., 1231, case 9,341, a bill by a purchaser of distributive shares of an estate to compel payment by the executor, it was contended in support of a demurrer to the bill that the complainant had a plain, adequate and complete remedy at law under the statutes and in the courts of the State of Pennsylvania wherein the court sat. Upon this contention Mr. Justice WASHINGTON (with whom sat PETERS, J.), said (page 1234):

> "If the counsel for the defendant meant to argue that because the plaintiff might have maintained an action in the state court for the recovery of this legacy, therefore the equity jurisdiction of this court is ousted, we must protest against the doctrine. *This case is clearly within the jurisdiction of this court. No objection can be made to the jurisdiction of the equity side of it, but that there is complete and adequate remedy* ON THE OTHER SIDE OF THIS COURT. It is no argument to say that the plaintiff may have such a remedy (could it even be truly said) in the state court. The conclusive answer is that the plaintiff is under no obligation to resort to that jurisdiction."

Coler v. *Board of Commissioners*, 89 Fed., 257, was a bill by the holders of county bonds to prevent the county officials from applying certain funds to any purpose except payment of interest coupons upon the bonds, and the defendants denied the equitable jurisdiction of the court on the ground that complainants had a plain, adequate and complete remedy at law. On this point Circuit Judge SIMONTON said, p. 260:

> "Such a remedy might, perhaps, be found in the practice under the code [of North Carolina], but this

> will not affect the ancient and well-established jurisdiction of the court of equity. 'The adequacy or inadequacy of a remedy at law for the protection of one entitled on any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought.' *Smyth* v. *Ames*, 169 U. S., 516, 517. *The test is, has he a remedy at law in this court? If he has not, then a court of equity has jurisdiction.*"

Niagara Fire Insurance Co. v. *Cornell, State Auditor*, 110 Fed., 816, was a bill to enjoin the enforcement of statutes of the State of Nebraska alleged to be in violation of the Constitution of the United States. In the consideration of certain special proceedings prescribed by the statutes the court, McPherson, D. J., said (p. 820):

> "I suppose all the states have special proceedings for the hearing of grievances, and such proceedings are sustained if along the line, somewhere, and by some reasonable method, the party can have a hearing in the courts. And it is equally clear that such remedy is not to the exclusion of the power of a Federal court to act. There may be a plain, speedy and adequate remedy at law in the state courts, but with the proper parties, with the requisite citizenship, and the necessary amount involved, a Federal court sitting in chancery may take hold of the case, and order the proper decree."

In *National Surety Co.* v. *State Bank*, 120 Fed., 593 (not yet reported in Circuit Court of Appeals reports), was a bill founded upon a wrongful state court judgment for which there was a plain, adequate and complete remedy at law in the state court. The Circuit Court of Appeals for the Eighth Circuit sustained the equitable jurisdiction of the Federal court, and in delivering the opinion Sanborn, J., said (p. 602):

> "It is a general rule that the absence of an adequate remedy at law is a *sine qua non* of jurisdiction in equity,

and it is earnestly insisted by counsel for the appellees that the complainants in this suit were entitled to no relief in equity in the Circuit Court of the United States, because they had an adequate remedy at law in the state court which rendered this judgment, under these provisions of the Code of Nebraska. There are, however, many reasons why this contention cannot be sustained. The first, and one that is fatal to the position, is that it is an absence of an adequate remedy at law in the national courts, and that alone, which conditions jurisdiction in equity in those courts, and the appellants have no such remedy. *The fact that they have a remedy at law in the state courts is not material. Smyth* v. *Ames,* 169 U. S., 466, 516, 18 Sup. Ct., 418, 42 L. Ed., 819; *Arrowsmith* v. *Gleason,* 129 U. S., 86, 98, 9 Sup. Ct., 237, 32 L. Ed., 630; *Mayer* v. *Foulkrod,* 4 Wash. (C. C.), 349, Fed. Cas., No. 9,341; *Bean* v. *Smith,* 2 Mason, 252, Fed. Cas., No. 1,174; *Coler* v. *Board* (C. C.), 89 Fed., 257; *U. S. Life Ins. Co.* v. *Cable,* 39 C. C. A., 264, 98 Fed., 761. When the controversy which this bill discloses arose between these citizens of different states, and was presented to the Circuit Court of the United States, that court had jurisdiction to hear and determine it, and the appellants had the legal right to the opinion and the judgment of that court upon the questions which it presented. This right and this jurisdiction were not conditioned by the fact that the complainants had or had not like rights or remedies in the state courts, or by the fact that those courts had or had not concurrent jurisdiction. *Indeed, this right and this jurisdiction were provided by the Constitution, and granted by the acts of Congress, for the express purpose of enabling citizens of different states to escape from an adjudication of their rights by state courts which had concurrent jurisdiction to grant the relief and to administer the remedies which they were seeking in the national courts."*

In *Stanton* v. *Embry,* 46 Conn., 595, where the same doctrine was applied by the Supreme Court of Connecticut, a bill was filed to enjoin an action at law upon a judgment

rendered in the District of Columbia, on the ground that by mistake the judgment was rendered for a larger amount than was due, and the court said on page 601:

> "It is claimed by the counsel for the respondent that this right to go into the court which rendered the judgment and ask for a new trial—a remedy which, it is claimed, is open to the petitioners under the laws of the District of Columbia—is an adequate, legal remedy, and that this court cannot assume equitable jurisdiction over the matter while the petitioners have this remedy. But no legal remedy can be considered as adequate which a party is compelled to go into a *foreign jurisdiction* to avail himself of. *It must be a remedy which our own courts can apply.*"

Respondent could not begin an action at law in the Federal court. It had no legal remedy, therefore, except such as petitioner chose to give it. The adequate remedy at law depended entirely upon the volition of petitioner, and petitioner would not begin an action in the Federal court. Instead, she began an action in the state court. As petitioner is a citizen of the State of Illinois, and respondent is a citizen of the State of New York, respondent had a *right* under the laws of the United States to remove that action, and any similar action, to the Circuit Court of the United States for the Northern District of Illinois, without restrictions other than those involved in a compliance with the simple formalities of filing a petition and a bond as required by the laws of the United States. It thus had the right to have the question of its obligations under the insurance policy *tried and determined in the Federal court and tested by the rules of law there applied.* This right is given it by the constitution and statutes of the United States (in the language of Mr. Justice GRAY in *Barrow Steamship Co. v. Kane,* 170 U. S., 100, 111), "to secure a tribunal presumed to be more impartial than a court of the state in which

one of the litigants resides," and, as said by SANBORN, J., in *National Surety Co.* v. *State Bank, supra,* "for the express purpose of enabling citizens of different states to escape from an adjudication of their rights by state courts." The right would have been of peculiar value in this particular case, because, as will be more fully shown hereafter, the rules of decision applied by the Federal courts to important questions involved in the controversy differ from those obtaining in the state court, and differ to the advantage of the company.

Unforunately a statute of Illinois and the penalties prescribed by it and an enforced agreement made under it interfere with the free exercise of this right of removal. Had that right been exercised it would have seemed to be the duty of the State Superintendent of Insurance (who has succeeded to the functions of the Auditor in respect to licensing and supervising insurance companies), to revoke respondent's license and to exclude it from business in Illinois, conforming to the statute, which has been inferentially sustained by the highest court of the state. *People ex rel.* v. *Pavey, Auditor,* 151 Ill., 101. That duty is conceded by petitioner. This situation furnishes apt illustration and ample demonstration of the wisdom of the founders of this Republic and of subsequent national legislators in providing the right here infringed. The continuance of this regulation upon the statute books of Illinois is a distinct discredit to the state, and its spirit of unfriendliness to the Federal judicial system would be more in keeping with the declamatory utterances of a populist orator upon the hustings.

In *Doyle* v. *Continental Insurance Co.,* 94 U. S., 535, such a statute of the State of Wisconsin was upheld, with an opinion by Mr. Justice HUNT, which does not altogether

satisfy one's ideas of sound and logical reasoning, and with a strong dissenting opinion by Mr. Justice BRADLEY, with whom concurred Mr. Justice SWAYNE, and Mr. Justice MILLER. For convenient reference we quote most of the dissenting opinion here. It was as follows (94 U. S., 543):

> "Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister states; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other. The citizens of the United States, whether as individuals or associations, corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States. Any agreement, stipulation, or state law precluding them from this right is absolutely void,—just as void as would be an agreement not to resort to the state courts for redress of wrongs, or defense of unjust actions; or as would be a city ordinance prohibiting an appeal to the state courts from municipal prosecutions.
>
> The questions arising upon these Wisconsin laws have already been considered by this court in the case of *Insurance Company* v. *Morse*, and we held and adjudged that the agreement which the company was compelled to make, not to remove a suit into the Federal courts, was absolutely void. In principle, this case does not differ a particle from that. The state legislation of 1872, under which and in obedience to which, the license of the appellees is threatened to be revoked, is just as unconstitutional and just as void as the agreement was in the former case.
>
> The argument used, that the greater always includes the less, and, therefore, if the state may ex-

clude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property.

The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance, and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring states would not only cripple their energies, but would deprive the people of those states of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations—at least those of a commercial or financial character—should be able to transact business in different states. If these states can, at will, deprive them of the right to resort to the courts of the United States, then, in large portions of the country, the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the state and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

The decision of the majority of the court in the *Doyle* case does not now seem to be the doctrine of this court.

Barron v. *Burnside*, 121 U. S., 186, and subsequent cases, cited, *supra*, under the brief of points, seem to be irreconcilable with it and in effect to overrule it. Apparently the views expressed by the minority of the court in the *Doyle* case have since prevailed, and nowhere is there, perhaps, plainer indication of this than in the concluding observations made relative to a non-resident corporation in *Dayton Coal and Iron Co.* v. *Barton*, 183 U. S., 23, 25, to the effect that the court does not care "to be understood to intimate that state legislation, invalid as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the state."

But for the purposes of this case it does not seem to be important or material whether the state statute be valid or invalid. If it is valid its practical effect is manifestly worse than if it is invalid.

Upon the assumption, however, that the statute is invalid, what was the situation? If the company undertook to remove the state court action, the state auditor would have revoked the company's license, not by means of a judicial proceeding in which the company could resist the revocation on the ground of the invalidity of the statute, *but summarily, and by a stroke of the pen;* and the auditor would further have published the revocation in the newspapers of the state, as directed by the statute. Such act of revocation would have been unlawful, according to the assumption, but it would nevertheless have been performed, and performed before a bill for injunction could be filed to restrain it.

It needs no argument to show that the revocation of the license by the auditor, and its attempted exclusion from the state for at least three years, though unlawful, and the re-

quired publicity of it, would have imposed *irreparable injury* upon the company—an injury which could not adequately be redressed by means of an action for damages against the auditor. The publication throughout Illinois of the fact that the auditor had revoked the license of the company would have practically destroyed the company's business there, even though, as a matter of law, the revocation were void. The risk of sustaining an irreparable injury, which was attendant upon the remedy at law obtainable by the means of removal, was such as to destroy the effectiveness of that remedy.

Plainly the penalty imposed by the statute constituted an obstruction and a hardship which rendered respondent's remedy at law in the Federal court *incomplete and inadequate*. It was not "equally effectual with the equitable remedy as to *all the rights* of the complainant." It was not a remedy which could be 'resorted to *without impediment.*" It was subject to "the imposition of heavy penalties and forfeitures," and to "a great and oppressive burden of risk." This position is well supported by judicial decisions.

Pacific Express Co. v. *Seibert,* 44 Fed., 310, was a bill to restrain the collection of taxes and of penalties for their non-payment, imposed by an act of the state legislature, and for a decree declaring the act unconstitutional. Upon demurrer to the bill it was contended, among other things, that complainant had an adequate remedy at law by way of resisting, on the ground of unconstitutionality, the collection of the penalties imposed. Though the demurrer was sustained upon other grounds the court (CALDWELL, J.) upon this point said, on page 315:

> "While it is true that the plaintiff might test the validity of the act in any suit brought by the state to collect the penalty imposed for the non-payment of the

tax, that would not be an adequate remedy, for the reason that during the pendency of such a suit the penalty of $100 would be accruing each day, and the plaintiff *be denied the right to carry on its business in the state.* It would take months, and possibly years, to reach a final decision of the case, and, if that decision should be favorable to the state the penalty visited on the company would be very heavy indeed, including, as it would, the penalty of $100 per day for the whole period, and the destruction of its business in the state, and probably great injury to its business in other states. *Equity abhors penalties, and holds the remedy at law inadequate when the assertion of the alleged right at law will be, or may be, attended by the imposition of heavy penalties and forfeitures. And upon this ground,* and because an action will not lie under the laws of Missouri to recover back the tax if paid, equity has jurisdiction in this case."

Bank of Kentucky v. *Stone*, 88 Fed., 383, was a bill by the bank to restrain the collection of taxes imposed by an act of the Kentucky legislature, upon the ground that the act was unconstitutional in that it impaired the obligaton of the contract contained in the bank's charter from the state. The case was heard upon demurrer to the bill by Mr. Justice HARLAN, sitting at circuit with Judges TAFT and LURTON. Respecting defendant's contention that complainant had an adequate remedy at law by resisting a suit for the taxes, the court said, per TAFT, J., on pages 390-1:

"It is well settled that in the Federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void, and independently of every other consideration. See *Rich* v. *Braxton*, 158 U. S., 375, 405; 15 Sup. Ct., 1006. It must appear from the special circumstances averred that there is no adequate remedy at law, and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable

injury. (Citing cases.) What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may, under the duress of the threatened trespass, pay the taxes alleged to be illegal, and then sue the City of Louisville, the County of Franklin, and the City of Frankfort, to recover them back. (*Railroad Co.* v. *Commissioners,* 98 U. S., 541.) It is to be observed, however, that no such action will lie except upon payment under duress. The bank could not simply pay under protest, and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy, as there was in Tennessee in the case of *Shelton* v. *Platt.* The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint; they *may resort to a simple suit at law for them.* In that case the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate; but, under the provisions of the revenue law of November, 1892, we do not think it is. By that law, the bank, on failing to pay the taxes assessed, according to its provisions, within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent., and to a fine of $50 a day for every day of the delinquency, to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay $50 a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity, the bank may enjoin the assessment, and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant, because, by the terms of the act, they do not begin to accrue until thirty days after notice to pay has been given by the collecting officer.

It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk, which is absent in an action in equity. The remedy at law is, therefore, entirely inadequate. Smyth v. *Ames,* 169 U. S., 466, 518, 18 Sup. Ct., 418; *Express Co.* v. *Seibert,* 44 Fed., 315. It is no answer to say that the payment of the tax and the action to recover it back constitute an adequate remedy, because no such action will lie, as already explained, unless there is a distraint, actual or threatened, and the collecting officer, by not distraining, may wholly deprive the taxpayer of this remedy. Indeed, the counsel for the City of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a *court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law* IF HIS ADVERSARY CHOOSES TO GIVE IT TO HIM. *The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.* To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justtice and its prompt administration as the remedy im equity.' *Boyce* v. *Grundy,* 3 Pet., 210, 215; *Sullivan* v. *Railroad Co.,* 94 U. S., 806, 811. And the application of the rule depends upon the circumstances of each case. *Watson* v. *Sutherland,* 5 Wall., 74, 79."

See also

Root v. *Railway Co.,* 105 U. S., 189, 216.

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The peculiar value to respondent of the right to have its controversy with petitioner adjudicated in the Federal court is apparent from facts already shown, but proper to be repeated here. The application for the policy signed by Herman D. Cable, deceased, and which became by its terms a part

of the proposed contract, provided "that the policy to be issued hereon shall take effect only upon payment of the first premium and delivery of the policy during my lifetime, sound health and insurable condition," and also, "that only the president, together with the secretary or the actuary, shall have the power to alter or waive the policy or any condition thereof." (*Rec.*, 11.) The policy also provided that "agents have no power to modify or change this contract, nor extend time for premium payment, nor waive forfeiture." (*Rec.*, 12.) After the policy had been executed by respondent at its home office in New York and forwarded to Chicago, it was tendered to Mr. Cable, with the request for payment of the first premium, and he refused to receive it, stating, in substance, that he wished first to consult with his friend Lord, who had made like written application for a similar policy at the time Cable's application was made. Afterwards Cable became ill of acute pneumonia. Then Lord, with full knowledge of Cable's critical condition, and with full knowledge of the provisions of the policy above quoted, and with the full knowledge, which any intelligent man must be assumed to have, that respondent, if it knew of the illness, would not deliver the policy, procured McCabe, the insurance broker, through whom both applications were made (and made on the initiative of the applicants, or of the brokers, not on the initiative of the respondent), to get from respondent the Cable policy and deliver it to him (Lord), at the same time paying the premium with his own funds without the knowledge of Cable. Cable died three days afterwards, and respondent learned nothing of his illness until after his death, unless such knowledge would be imputable to it through Lord's brief observation to the broker, McCabe.

Now, under these circumstances respondent could *in the Federal court* defeat an action brought by petitioner, even

though McCabe, who made the manual delivery of the policy had known at the time of delivery all the facts of Cable's critical condition; for the delivery of the policy with such a knowledge on his part would not, in view of the contract provisions alluded to, operate as a waiver by respondent of the condition that the policy should not take effect except upon delivery during Cable's *sound health and insurable condition.* Under the *Federal court rule,* if McCabe knew of or participated in the fraud intended to be perpetrated upon respondent, the policy was nevertheless void.

Northern Assurance Co. v. *Grand View Bldg. Ass'n,* 183 U. S., 308.

N. Y. L. Ins. Co. v. *Fletcher,* 117 U. S., 519.

Maier v. *Fidelity Mut. Life Assn.,* 24 C. C. A., 239; 78 Fed., 566.

U. S. Life Ins. Co. v. *Smith,* 34 C. C. A., 506; 92 Fed., 503, 507.

On the other hand, *in the State court,* actual knowledge on the part of McCabe of Cable's illness at the time the policy was delivered, would probably, under the rule there obtaining, have been held to operate as a waiver by respondent of the contract condition avoiding the policy unless delivered during sound health, and the policy would consequently have been held to be *valid* and binding.

Hancock L. Ins. Co. v. *Schlink,* 175 Ill., 284.

Thus, if the Circuit Court had not taken jurisdiction of this suit respondent would, through the practical operation of the state statute in question, have been restricted to a remedy governed by a rule of law different from that obtaining in the Federal court, a rule regarded as erroneous in the Federal court, and as opposed to justice and right (*Northern Assurance Co.* v. *Grand View Bldg. Ass'n,* 183

U. S., 308),—just the kind of predicament from which the constitution and laws of the United States relating to the removal of causes were intended to relieve suitors. Thus, respondent would have been delivered over to the state court to be mulcted by means of a rule of law under which, perhaps, a mere messenger boy, from a public messenger office, delivering an insurance policy, may apparently waive and annul, by mere knowledge, the solemn provisions of a written contract for insurance.

Though respondent could not, in the nature of such matters, know positively, in advance, when this bill was filed, that petitioner would in the state court attempt to prove, or succeed in proving, knowledge on the part of McCabe concerning Cable's illness, thus makng ground for the invocation of the rule applied in the *Hancock* case, yet it was not only possible, but highly probable, that she would make the attempt; for, if the bill was true, no other course could possibly avail her. The possibility or probability of this was as forceful in favor of the position here contended for as if the bill had alleged in plain terms that petitioner intended to take that course upon the trial.

Still further justification for the respondent's resort to the Federal court in equity is furnished by a recent decision of the Supreme Court of Illinois in the case of *Robinson* v. *Sharp,* 201 Ill., 86, where it was held that "a court of equity may entertain a bill to investigate the alleged fraudulent conduct of an attorney in obtaining a contract from a client, and may set aside such contract if found to be unfair or obtained by undue advantage." In the determination of that case the court laid down a rule which seems fairly to give rise to doubt whether respondent could have introduced its defense of fraud at all in the action at law in the state court, or could hereafter do so if the present decree

were to be reversed and respondent were left to its remedy in the state court. In order that we may not be thought to present erroneously the position of the Supreme Court of Illinois, we quote all that is said on the point now under consideration in the opinion delivered in that case, beginning on page 88:

> "The alleged false representations which the appellees relied upon to defeat the written agreement which they had executed did not relate to the nature of the instrument signed by them, but to the nature and value of the consideration. Fraud touching the execution of an instrument, such as misreading, the fraudulent substitution of one paper for another, or obtaining by some trick or device an instrument which the party did not intend to execute, may be availed of in defense to an action on the instrument in a court at law. But if the party who has executed a written instrument, understanding at the time what he was signing, desires to avoid the legal effect of the writing on the ground he was induced to sign it by misrepresentations, false statements and deceit as to the nature, extent and value of the consideration, made by one who occupied a fiduciary relation to him, *he must resort to a court of equity for a decree reforming or setting aside the instrument.* This is the rule in all jurisdictions where the distinction between law and equity is retained. (*Papke* v. *Hammond Co.*, 192 Ill., 631.) An exception to the rule exists, by express statutory provisions, when it is desired to question the consideration of a negotiable instrument for the payment of money or property. (Starr & Cur. Stat. 1896, chap. 98, par. 13.) It is unnecessary to here inquire whether the exception did not also exist at the common law in cases of negotiable instruments, for the reason the instrument here under consideration is not a negotiable instrument. Courts of equity have long entertained bills brought to investigate alleged fraudulent conduct in transactions between client and counsel, and to declare such transactions void on the ground of constructive fraud if found to be unfair or obtained by

undue advantage (Citing cases). The chancellor did not err in retaining jurisdiction of the bill."

It will be observed that the foregoing decision makes no distinction between sealed and unsealed instruments, but relates to the kind of fraud which may or may not be offered as a defense to a contract at law. Its suggestion of a fiduciary relation underlying the contract involved seems to be without bearing in this Cable case, for, there is no greater relation of trust and confidence between an attorney and a client than between a life insurance company and an applicant for life insurance. Whether the rule stated would be allowed to stand as a general rule, even by the court which has enunciated it, may be open to doubt, but it is the last pronouncement of that court upon the subject, and under such a decision it would seem that it would be the duty of counsel for petitioner to object to the admissibility of the defense of fraud in an action at law against respondent in the state court. Such an objection would give rise to controversy, possibly to an appeal to the state Supreme Court, and would occasion delay and doubt. Under these circumstances the legal remedy in the state court could not be regarded as either adequate or plain, and respondent ought not to be compelled to "speculate" upon a chance of obtaining relief at law where equity can give relief.

Davis v. *Wakelee*, 156 U. S., 680, 688.

Respondent had made no agreement not to invoke the *equity* jurisdiction of the Federal courts in Illinois, but its invalid agreement not to remove an action at law has been strictly performed.

That the decision of the jurisdictional question in this Cable case has commended itself to the judgment of courts in

other circuits will be apparent from two later decisions to which this court is respectfully referred.

Mutual Life Ins. Co. v. *Pearson,* 114 Fed., 395.

Union Life Ins. Co. v. *Riggs,* 123 Fed., 312.

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Multiplicity of Suits and Loss of Testimony.

If the position of respondent thus far is sound, little need be said upon the two points of possible multiplicity of suits and possible loss of testimony, but they are both deserving of attention.

Under the Illinois statutory provisions above set forth concerning the administration of estates, the power of petitioner to make a final and conclusive election to take the commuted value under the policy, without authorization by the Probate Court of Cook County, is at least doubtful. This view is fortified by the case of *Washington* v. *Louisville and Nashville Ry. Co.,* 136 Ill., 49, 56, which is the only pertinent decision found.

By the policy, if binding, respondent would be obliged to pay $50,000 in thirty consecutive annual instalments of $1,666.66 each to the estate of the insured, subject to the provision that at the maturity of any instalment the unpaid instalments *may* be converted into their cash value according to a specific table, under which the commuted value of all the instalments is $30,000. An election by the beneficiary is here provided for. The pleadings show that petitioner has received no authority from the Probate Court of Cook County to make an election for the estate to receive the commuted value of the instalments, and an issue is directly

made by them whether she has any such authority without the direction of the Probate Court. The mere commencement of an action for the commuted value cannot constitute such an election, unless it is supported by the requisite authority.

When the bill was filed petitioner had made two different demands upon respondent,—one for the commuted value of all the installments, the other for the amount of the first installment only. (*Rec.*, 19.) There seems to be something of inconsistency between the two demands, and in that view respondent might naturally feel some uncertainty as to petitioner's course. Her action may be an attempted election to take the commuted value, but it is apparent that if the attempted election to take the commuted value is unauthorized, respondent could be subjected to a series of actions in different jurisdictions for installments periodically falling due. It would have been possible for petitioner by means of voluntary non-suits to speculate extensively as to the views of different courts, and, in consequence of appeals, to have a number of different actions running at the same time in courts of first instance. If her election did not bind the estate, the Probate Court could disregard it at any time, and in the posible event of her death it might well be that an administrator *de bonis non* would do so, deeming the full instalment value of the policy greater than its commuted value. It was plain that the cancellation of the policy in equity would effectually prevent this possible multiplicity of suits against respondent.

In the above cited case of *Washington* v. *L. & N. Ry. Co.*, 136 Ill., 49, discussing Sec. 83 of the ~~constitutional~~ *statutory* provisions under consideration, it is said (p. 56):

"The section of the statute referred to REQUIRES the

> administrator to secure an order of the Probate Court authorizing him to settle or COMPOUND claims due the estate."

The case of *Boyce's Executors* v. *Grundy*, 3 Peters, 210, was a bill to cancel a contract (obtained by fraud) which provided for the payment of $20,000 in annual instalments of $2,000 each. Judgment had been entered against complainant upon the first two instalments, and the fraud alleged in the bill had not been set up in these cases as a defense. Mr. Justice JOHNSON, delivering the opinion, said on page 215:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
>
> "In the case before us, although the defense of fraud might have been resorted to and ought to have been sustained in that particular suit, and, I will add, would have greatly aided the complainant in a bill to rescind, *yet it was obviously not an adequate remedy, because it was a partial one. The complainant would still have been left to renew the contest upon a series of suits, and that probably after the death of witnesses.*"

In *Buzard* v. *Houston*, 119 U. S., 347, Mr. Justice GRAY, delivering the opinion of the court, on page 352 referred to and approved the decision in *Boyce's Executors* v. *Grundy*, in the following language:

> "Accordingly a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind, or in degree, on the equity side than on the common law side; as, for instance, . . . where an agreement procured by fraud *is of a continuing nature*, and its rescission will prevent a multiplicity of suits, as in *Boyce* v. *Grundy*, 3 Peters, 210, 215, and in *Jones* v. *Bolles*, 9 Wall., 364, 369."

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The proof of fraud was shown by the bill to depend chiefly upon the witnesses, Lord and McCabe. The possibility of their death, or of their unavailability in the many suits which might be brought by petitioner, or her successor as administrator *de bonis non*, upon the various instalments, was an additional circumstance entitled to weight in the Circuit Court upon the question whether equity ought to interpose to relieve respondent in respect of the fraud alleged in the bill.

Boyce's Executors v. *Grundy*, 3 Pet., 210, 215.

2 Story's Eq. Juris., Sec. 700.

Schmidt v. *West*, 104 Fed., 272.

Fuller v. *Percival*, 126 Mass., 381.

It should be remembered that the bill was *not* for an injunction only. The primary relief sought by it was the cancellation of the policy, and the injunction was sought as incidental to that relief. If, as argued for petitioner, the injunction could not properly be granted, this was no reason why the Circuit Court should not take jurisdiction to accomplish the cancellation.

But the issuance of the injunction prayed for would not violate Section 720 of the Revised Statutes prohibiting the granting of injunctions to stay *proceedings* in the courts of courts of a state. That section, and the cases cited by counsel for appellee on this point, have no application here; for, as alleged in the bill, the Federal Circuit Court first acquired jurisdiction *of the parties*. While summons was first issued in the state court action, process in this suit was first served, and the circuit court could have enjoined petitioner, *as a party*, from further prosecuting her action, or any action, at law in the state court.

Arrowsmith v. *Gleason*, 129 U. S., 86, 98-101.

Marshall v. *Holmes*, 141 U. S., 589, 599-600.

No injunction exists, and nothing has interfered with the jurisdiction of the state court over the action there pending, which could proceed concurrently.

Buck v. *Colbath*, 3 Wall., 334, 345-6.

Stanton v. *Embrey*, 93 U. S., 548, 553-4.

And other cases cited under the brief of points, *supra*.

II.

THE MERITS.

Upon the merits of the case, four judges have concurred,—or rather, it may be said, *six*, for five different judges sat in the Circuit Court of Appeals on the two appeals, and Judge Bunn, delivering the opinion of the court in the first appeal, said of the facts afterwards proved:

> "The fraud perpetrated is something quite appalling in the baldness and boldness of its outlines."

This unanimity of opinion on the part of so many judges below is sufficient in itself to create a strong presumption against the existence of any ground requiring this court to reverse the decree. And the decree will be found adundantly supported upon examination of the record. The answer of the petitioner to the amended and supplemental bill averred that the "true condition" of the insured "was fully told and made known" to the respondent prior to the delivery of the policy, and that the death of the insured was *not* occasioned by pneumonia. The decree, and the decision of the Circuit Court of Appeals sustaining it, both proceed

upon the ground that, in fact, there was *not* notification to the respondent of *the illness* of the applicant for insurance by the person who procured the delivery of the policy when the applicant lay upon his death-bed in the grasp of acute pnuemonia. The circuit court was unwilling to find the fraud *intentional,* but no such unwillingness actuated the Circuit Court of Appeals, which went further and said:

> (*Rec.,* 175.) "It is, however, urged that sufficient information was disclosed by Lord to McCabe to put the company upon inquiry, and that, with such notice, McCabe delivered the policy and received the premium; that McCabe was the agent of the company and notice to him was notice to the company, and the delivery of the policy constituted a waiver of the condition and warranty. Upon the assumption that McCabe was such agent of the company and that his action must be treated as the action of the company—questions which we do not determine—it becomes us to inquire of the sufficiency of the notice given, and whether the act of delivery of the policy involved a waiver of the warranty."
>
> (*Rec.,* 177.) "It cannot here be doubted that if the insurance company or McCabe as its agent had been informed of the fact, within the personal knowledge of Lord, that Cable was seriously ill with acute pneumonia, the policy would not have been delivered. It is difficult for us to believe that Lord, with that knowledge, could think he had a right to accept this policy; but whether so or not, the concealment of the fact was a fraud upon the company. The statement made was deceptive and misleading, whatever were the intentions of Lord, and a court of equity ought not to permit the completion of the wrong. Courts of equity cannot sustain an insurance upon the life of a dying man, when the nature of his malady and the seriousness of his illness are concealed from the insurer."

Contracts of insurance are *fiduciary contracts.* They are *uberimae fidei.* The application is a *continuing offer* to become insured upon the conditions therein set forth, and the statements therein made are continuing representations until

consummation of the insurance. When the insurer delivers the policy and thus completes the contract, he does so subject to those conditions and representations, and in reliance upon their continued truth and upon the state of physical health as found by the medical examiner. If, before delivery, a representation of the application has become untrue, or a change occurs in the applicant's physical condition which materially affects the risk, it is his legal duty, and that of those representing him, to voluntarily disclose to the insurer the facts of the matter as fully, explicity and particularly as he himself knows them. The omission or failure to do this, *whether intentional or not,* constitutes a fraudulent concealment which vitiates the policy if delivered. These are elementary propositions, abundantly supported by the authorities cited under "point" VII, *supra.*

Counsel for petitioner in their brief, page 24, cite decisions holding that where answers to questions in an application are partial, unresponsive or inexplicit, it is the insurer's duty to make further inquiry, and if, failing to do so, it writes and delivers the policy based on that application, it cannot afterwards be heard to complain of the existence of facts which the answers, if complete and responsive, would have disclosed. Manifestly, these authorities do not apply to a case where the material fact affecting the risk comes into existence *after* the making of the application and *after* the medical examination which are to be the basis of the contract, and before the insurance is consummated. Where pending the closing of the contract some new fact arises, material to the risk, and known to the applicant, it is for the applicant to disclose it, and to disclose it without inquiry, and co-extensively with his own knowledge. Nothing less than this would be consistent with the highest degree of good faith, which is *then* the measure of his duty. Let us examine Lord's alleged disclosure in the light of these principles.

At the time of delivery McCabe said to Lord: "Cable is all right, isn't he?" According to the testimony of Lord, who was a witness on behalf of petitioner, his reply was: "Mr. Cable has been sick for two or three days, but is no worse than he has been for the last forty-eight hours." This was denied by McCabe, a witness on behalf of the company, who said that the sole reply was, "The same as he has been for forty-eight hours," given in such a tone and in such a manner as to convey the meaning that Cable was all right. McCabe was somewhat discredited, but not more than Lord; and Miller's testimony (*Rec.*, 115) that, after the death, McCabe, in telling the story of the transaction, stated the "reply" nearly in the language of Lord's version—though competent as affecting McCabe's credibility—was incompetent as evidence of what the "reply" was, because at that time McCabe's possible agency for respondent in delivering the policy, which at most was only a special agency, had ceased. Thus, the direct evidence upon the question whether Lord told McCabe that Cable had been sick, or as Miller says, "not very well," for two or three days, stood equally balanced. In this situation McCabe's story, and not Lord's should be taken as true, for two reasons:

First. Upon the question of disclosure the burden of proof was on the defendant. Her defense was by way of confession and avoidance. Confessing that when the policy was delivered Cable was not in sound health, and that sound health was a condition precedent to its validity, she set up, in avoidance, a waiver by the company of that condition; and it was for her affirmatively to establish the waiver by showing full disclosure of the illness before delivery. But irrespective of the contract conditions, proof of the naked fact that the policy was delivered while Cable had pneumonia made out a *prima facie* case of fraud, which put the defendant

upon justification, requiring her to show that the company was, at the time, fully informed of the illness (Underhill on Evidence, Sec. 250; Bigelow on Fraud, Vol. 1, p. 135; *Elkin* v. *Jansen*, 13 Meeson & Weslby, 655); and this, notwithstanding the negative averment of fraudulent concealment made in the bill. (*Carroll* v. *Malone*, 28 Ala., 521.)

Second. The circumstances surrounding the delivery corroborated McCabe and discredited Lord. Lord, an experienced business man, a wholesale druggist and a banker, who had frequently taken out insurance upon his own life (*Rec.*, 113), must have been familiar with the fundamental principles of life insurance, and must have known that the company would not wittingly, in consideration of $848.50 per annum (a rate based upon sound health) enter into a risk of $50,000 upon the life of a man then in the grasp of one of the most dangerous of all diseases, pneumonia. Yet, knowing this, he formed the purpose of procuring the policy, before the interview in which it was delivered. *Being aware that he could not carry out that purpose without concealing the illness, he must have intended concealment.* When he sent McCabe to the office for the policy, saying he would take and pay for it, he breathed no word of Cable's condition. If he had intended to disclose, he would have done so then. He would not have waited until the policy was in his hands, nor until questioned. It is evident that he would have said nothing at all but for McCabe's casual inquiry. Disclosure was inconsistent with his purpose. Upon the assumption of McCabe's honesty, disclosure would defeat the purpose. *Intending to conceal* the illness, is it likely that he, at the last moment, said anything to disclose it? Is it probable that he used language that might lead McCabe to withhold delivery? McCabe's version of the reply is perfectly

consistent with Lord's evident intent, and Lord's version is not. The admitted statement of Lord, that Cable "was no worse than he had been for forty-eight hours," made to a man who was entirely ignorant of the illness, was itself indicative of deceit; and the very fact that McCabe delivered the policy, is, in the light of the other circumstances, significant of non-disclosure to him. Under the evidence the circuit court should have found that Lord's reply to McCabe's question was in the language stated by McCabe. In that case it must be conceded that there was no disclosure at all, and conversely, and that there was a fraudulent concealment vitiating the policy.

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But let it be assumed for argument that the master and the circuit court were correct in finding that Lord's full reply to McCabe was, "Cable has been sick for two or three days but is no worse than he has been for forty-eight hours." This did not give such information as Lord, with knowledge of the pneumonia, was in duty bound to give. It was not a disclosure commensurate with the highest degree of good faith. It did not reveal the fact that since the application *a change had occurred* in Cable's physical condition which *materially affected the risk*. It was not as explicit and particular as Lord's own knowledge. In the application *Cable had represented that he had never had pneumonia,* and Lord's reply did not disclose in the slightest degree that such representation (a continuing one) had become untrue. The material and important thing was the *degree* of the illness, the serious character of it, the fact that it was of such nature as to deprive Cable of "sound health" as understood in the law of insurance; and Lord's reply afforded no information on that point. It was of no con-

sequence to the company that Cable had been sick for two or three days, unless he was *seriously* sick. If the sickness had consisted of a cold, a headache, a toothache, or some other slight ailment, Cable would have been entitled to the policy, because such a disorder would not materially affect the risk. Lord's reply was entirely consistent with Cable's then being in sound health, and it was, therefore, not a disclosure of unsound health. The failure to be explicit was as much a concealment and a fraud as if Lord had spoken nothing. *Ely* v. *Hallett*, 2 Caines (N. Y.), 57; *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S., 485, 510. "The statement was one of those half-truths that was far more dangerous and misleading than a downright falsehood, and it perfectly accomplished its purpose of deceit. (*Equitable Life Assur. Co.* v. *McElroy*, 83 Fed., 635.) Counsel for petitioner do not apparently contend that the reply disclosed Cable's unsound condition of health, but they assert a doctrine that it was sufficient to put the company upon inquiry, and that it constituted constructive notice of all facts which such inquiry would have developed. It has been already noted that one upon whom the law imposes the highest degree of good faith cannot shelter himself under such a doctrine. It has no place in transactions between fiduciaries. Lord's position was analogous to that of a trustee asserting acquiescence against his *cestui que trust* based upon information imparted by him; and in such case it is fundamental that there can be no acquiescence unless the information given was as full, particular and complete as the trustee himself had. As said by Lord ELDON, *Walker* v. *Symonds*, 3 Swanston, 1, 73, respecting the duty of a trustee to disclose to the *cestui que trust:*

> "He who, undertaking to give information, gives but half information, in the doctrine of this court conceals."

Not only did the reply fail to disclose the material fact, but the failure was manifestly intentional. Lord's entire attitude, his introducing the subject of the Cable policy of his own accord, his sending McCabe to get it without mentioning the illness, his silence until questioned and until the policy was practically in his possession, and the manner and language of the reply itself, are, in the light of subsequent developments, strongly persuasive evidence of an attempt to conceal and to deceive; and the fact that he was endorser on Cable's paper to the extent of $45,000 or $50,000 may have supplied a motive for his conduct. The opinion of the district judge that the reply was made in the "hurry of business" and that the concealment was unintentional has no support in the evidence. Lord himself, in his testimony, did not attempt to thus excuse or palliate his conduct; *he* considered it perfectly proper. (*Rec.*, 113.) But whether or not he had a conscious intent to conceal, this is a case for the application of the rule that a man must be held to have intended the necessary and inevitable consequences of his own acts.

It is submitted that delivery of the policy by McCabe with no more knowledge of Cable's illness than that given to McCabe by Lord's own version of the reply, afforded no ground for a reasonable claim that respondent was estopped from asserting fraud and had waived the contract condition respecting delivery during sound health.

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But let it be further assumed for argument that Lord's reply to McCabe was a full disclosure to a local and special agent of the company of such facts respecting Cable's illness as it was Lord's legal duty, acting on behalf of Cable, to disclose. Upon this assumption it is contended that such dis-

closure affected respondent, and that the coincident delivery of the policy operated as a waiver by respondent of the written condition contained in the application, that the policy should take effect only upon delivery during Cable's *sound health and insurable condition.* This is denied. In the first place, the doctrine of waiver is but an application of the principle of estoppel, and it involves the proposition that a party claiming the benefit of it must in some way have been induced to change position for the worse through an act of the other party, so that it would be inequitable to permit the other party to repudiate the act. In this case the payment of the premium by Lord under the circumstances shown can hardly be said to have wrought a change of position for the worse on Cable's part in reliance upon McCabe's action. In the second place the contention as to waiver is untenable because of the limitations upon McCabe's authority, which were known to both Cable and Lord. This is hardly an open question in this court, as already pointed out in discussing the question of jurisdiction. These limitations are contained in the written application, and in the policy itself, both of which Cable, as well as Lord acting for him, is conclusively presumed to have read. Lord's own policy, which had been lying on his desk for a week, contained similar limitations. The application provided as follows:

> "It is hereby declared and agreed . . . that this *application* and declaration shall, *with the policy* herein applied for and the benefits and conditions *and notice* contained therein, *be the sole basis of the contract* between me and the company, and shall be binding on all parties in interest under such policy; and that the policy to be issued hereon shall take effect only upon payment of the first premium and *delivery* of the policy during my lifetime, *sound health and insurable condition:* 2d. That *only the president, together with the secretary or*

the actuary shall have the power to alter or waive the policy or any condition thereof."

The *policy* set forth that the insurance company, *"in consideration of the application (hereby made part of this contract)"* and of the payment of the stated premiums when due, agreed to pay the insurance of $50,000 "subject to the 'BENEFITS AND CONDITIONS' and 'NOTICE' on the succeeding pages hereof;" and under the title "NOTICE" thus referred to, was the provision that *"agents have no power to modify or change this contract nor extend time for premium payment nor waive forfeiture."*

Considering McCabe as an agent of respondent, these limitations upon his authority, which were a part of the proposal for the insurance and of the proposed contract, rendered Lord's disclosure to him ineffectual as a disclosure to respondent, and his coincident delivery ineffectual as a waiver by respondent. McCabe could not, by any act or parol agreement, overthrow the express written terms of the contract as made and delivered. The case here is certainly not as strong as if McCabe had expressly stated to Lord that he would and did waive on behalf of the company the effect of the illness, but even in that supposed case the policy would not be binding according to the decisions of this court and to the settled course of judicial authority in the Federal courts generally, as shown by the citations under "point" VIII, *supra*, especially *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S., 519, 529; *Northern Assurance Co.* v. *Grand View Bldg. Ass'n*, 183 U. S., 308, 361; and *Maier* v. *Fidelity Mut. Life Ass'n*, 24 C. C. A., 240, opinion by Mr. Justice HARLAN, showing, among other things, what was decided in *Ins. Co.* v. *Chamberlain*, 132 U. S., 304, in which the opinion was written by him, and which was at one stage of this case considerably relied upon by petitioner's counsel.

Even supposing for argument that McCabe had apparent authority to waive any and all contract conditions, and that Lord fully disclosed to him, the policy is nevertheless invalid for fraud. Decisions above cited establish that the rule which charges a principal with the knowledge of his agent is for the protection of *innocent* third persons. If a person colludes with an agent to cheat and defraud the principal, the latter is not responsible for the act or knowledge of the agent. In the case supposed Lord's knowledge that the disclosure to McCabe did not reach respondent, and that McCabe was committing a fraud upon respondent by delivering the policy would prevent any just claim of innocent reliance in good faith upon McCabe's action; and it would be held that Lord participated in McCabe's fraud, conspiring with him to wrong the company. In such circumstances, neither Lord nor his principal, nor any beneficiary under the policy, could set up estoppel against the company based upon any act of McCabe, the co-conspirator.

Counsel for petitioner, on page 16 of their brief, state the proposition that contracts entered into by a foreign insurance company within a state "are controlled by the statutes of the state," and they cite *New York Life Ins. Co.* v. *Cravens*, 178 U. S., 398, in support of that proposition. The *Cravens* case dealt with the question whether a certain policy of life insurance made by a New York company in the State of Missouri with a citizen of Missouri was subject to a Missouri statute regulating the nature and terms of life insurance policies and making such policies non-forfeitable under certain circumstances. It was held that the Missouri statute applied. There is no occasion for respondent to concern itself with the decision of that case, for there is no Illinois statute governing the interpretation or effect of the policy

in this case, nor are there any Illinois insurance statutes whatever involved, except the one which is about to be discussed and which is not conceived to have any application. The principles of general insurance law, which the Federal courts determine for themselves independently of state decisions, govern this case.

But it seems to be argued by counsel for petitioner under their proposition that even if the delivery by McCabe with imputed or actual knowledge of Cable's real condition, would not, under the general principles of insurance law, as enunciated by this court, operate as a waiver, such supposed knowledge should so operate by virtue of the Illinois statute declaring in substantial effect that under certain specified circumstances persons shall be considered agents for life insurance companies. We fail to see how this statute helps petitioner's case, because, *first,* rightly understood, it does not govern even the *relation* between the respondent and McCabe, and, *second,* whatever its effect upon McCabe's *relation,* it does not prescribe the *extent of his authority* nor affect or nullify the plain limitation upon that authority, of which limitation Cable and Lord had knowledge.

Counsel for petitioner evidently share the impression, which is quite widely current, and to which the supreme court of Illinois has by some expressions, apparently not well considered, given countenance, that by force of certain Illinois statutory provisions (printed in an appendix hereto), *all* persons who solicit the placing of insurance, either fire or life, are made agents under our state statutes, *as between such persons and the companies* in which insurance may have been effected partially through their instrumentality. This is believed to be an erroneous impression, as is well shown by the case of *United Firemen's Insurance*

Co. v. *Thomas* (on rehearing), 34 C. C. A., 240, 243; 92 Fed., 127, 130, decided by the Circuit Court of Appeals for the Seventh Circuit. That case related to certain provisions in a section of another statute concerning fire, marine and inland navigation insurance companies, organized outside of the United States, but it is quite as instructive in respect to the corresponding provisions contained in Sections 22 and 23 of the life insurance statute (*Appendix*, XXVI, XXVII. The provisions passed upon in the *Thomas* case, relating to insurance by *foreign* companies (*Appendix* XXIII, XXIV), are duplicated in substantially identical language in the general fire insurance statute relating to insurance by companies, organized in the United States but outside of Illinois (*Sec.*, 22; *Appendix* XVIII). Both the general fire insurance and the life insurance statutes, as in force when this case arose, were passed in the month of March, 1869, and practically established insurance codes for the state. The provision of the fire insurance act contained in the long Section 22 (Hurd's Stat., Ch. 73, Par. 68; *Appendix* XV), are quite largely duplicated by the provisions of the life insurance act in the short sections, 3, 7, 15, 21, 22, 23 and 24 (*Id.*, Pars. 183, 187, 195, 201, 202, 203, 204; *Appendix*, XXV). Upon a careful examination of these various sections, it will be seen that Section 23 of the life insurance act is certainly no stronger, and it seems even weaker, than the corresponding provisions of the fire insurance act, identical in terms with the provisions of the foreign insurance companies' act discussed in the *Thomas* case, for the life insurance section clearly refers only to persons acting in connection with companies neither incorporated in Illinois *nor lawfully established in business* in Illinois. Respondent is not *such* a company. It has admittedly been

for many years established in Illinois under proper license. The statute prescribes the terms on which life insurance companies of other states, and their agents, may do business in Illinois, forbids persons to transact any life insurance business for companies which are not qualified to do business in the state in conformity with its laws, and it then contains this section, which is relied upon by counsel, but is obviously directed exclusively *against persons* assuming to act in behalf of "underground" or "wild-cat" companies:

> "Whoever solicits insurance on behalf of any life company not chartered by *and not established within* this state, or transmits, for any person other than himself, an application for life insurance, or a policy of life insurance, to or from *such company*, or advertises that he will receive or transmit the same, shall be held to be an agent of *such company* to all intents and purposes, and subject to all the duties, requisitions, liabilities and penalties set forth in the laws of this state relating to life insurance companies not incorporated by the legislature thereof."

Language can hardly be imagined to make the foregoing provision more clear, and it is difficult to see how anyone reading the section with any care can interpret it as intending anything more than to bring persons acting in connection with such "underground" and "wild-cat" companies under the same statutory regulations and penalties applicable to agents of foreign life insurance companies lawfully established in Illinois. This is the only section upon which the supposed statutory agency of a solicitor or broker is predicated.

Two Illinois cases have been cited as showing a different construction of the statute by the Illinois supreme court, viz.: *Insurance Co.* v. *Ruckman*, 127 Ill., 364, and *John Hancock Mutual Life Ins. Co.* v. *Schlink*, 175 Ill., 284. The Circuit Court of Appeals for the Seventh Circuit,

in the rehearing of the *Thomas* case, had no difficulty in disposing of the *Ruckman* case in terms that are equally applicable to the *Schlink* case, which we think can be as easily disposed of here. The *Thomas* case was decided (on the rehearing) in February, 1899, and the *Schlink* case in October, 1898, so that apparently neither decision affected the other.

In the *Schlink* case a brief reference is made to the *Ruckman* case as an authority on the construction of the statute, but under the *Thomas* case that reference must be regarded an unreliable and unsound one. The reference was wholly unnecessary, for the person whose relations were under consideration was an apparent *"general agent"* of the company (p. 287), which accepted his acts, and the writer of the opinion says he "made contracts" (p. 290). It was, therefore, wholly unnecessary to bring in the *statute* to show that such a person was the agent of the insurance company, instead of being the agent of the insured. The *Schlink* case gives no more authoritative construction to the statute than the *Ruckman* case did. It merely professed to follow the *Ruckman* case in the same way as the *Ruckman* case, erroneously professed to follow the prior case of *People* v. *People's Insurance Exchange*, 126 Ill., 466.

But, in reference to these two cases, we do not need to go even as far as the court went in the *Thomas* case, sound though that view is believed to be. It is sufficient to point out that neither case attempted to pass upon anything beyond the question of bare *relation*—the question whether the particular person discussed should be regarded as the agent of the insured or of the insurer. In neither case is anything decided, or even said, respecting the bearing of the statutory provision upon the apparent *authority* of agents,

or upon limitations of "their apparent authority." So far as there is any implication at all it may be said to be distinctly in favor of the view that no prohibition upon limiting an agent's powers is contained in the statute, for the opinion in the *Ruckman* case refers approvingly to a Wisconsin decision holding that the stronger statute of that state has changed the ordinary rule of law "that the insured must at his peril know whether the person with whom he is dealing has the power he assumes to exercise, or is acting within the scope of his authority." (127 Ill., p. 377.)

The Wisconsin statute is likewise quoted and considered in the *Thomas* case (34 C. C. A., 246, 247; 92 Fed., 132, 133), and it will be seen that it applies in terms to persons acting either on behalf of *any* insurance corporation, or on behalf of *any applicant* for insurance. No case has been found holding that either statute prohibits limitations of an agent's authority or destroys the effect of such limitations of authority as are distinctly and affirmatively called to the attention of an applicant. The utmost that could possibly be claimed for the Illinois statute would be what was in substance said of the Wisconsin statute by the supreme court of Wisconsin namely, that it takes away from an applicant for insurance the burden,—ordinarily resting upon every person dealing with an agent (1 Joyce on Ins. Sec. 430),—of ascertaining at his peril the extent of the agent's authority, and casts upon the insurer the burden of affirmatively notifying an applicant of the limitations upon the agent's authority, if the insurer desires the benefit of such limitations. Just such notification was given in this case.

To say, then, that McCabe was an "agent" of respondent under the Illinois statute or otherwise, does not dispose of the question as to his real or apparent authority to waive contract conditions.

Right here it may be said that although McCabe and Finney solicited and procured as independent brokers the application from Cable and *tendered the insurance* to the general agent of respondent, it probably must be considered that Finney, at least, became subsequently a special agent of respondent *for the single and limited purpose* of delivering the policy to Cable and of collecting the first premium. But neither the respondent nor its general agent at Chicago knew anything about McCabe (*Rec.*, 77), when the policies were given Finney for delivery, and it is quite a different question whether McCabe ever came in any way into *any* agency relation with respondent. The Circuit Court of Appeals expressly reserved that question (*Rec.*, 175), and it is not believed material to a decision of this case. In any event, the authority of McCabe as a possible or supposed agent was no greater than would have been possessed by an ordinary messenger boy employed for the same purpose.

The *Schlink* case has apparently been thought by counsel for petitioner to control this case. The facts in that case were in some respects much like those here, but no issue was made there about the illness of the insured. The reason seems plain. *There was a technical delivery and an acceptance of the policy before the illness,* although there was no manual tradition nor payment of the premium (p. 288.) The insured *accepted* the policy, and told the "general agent" who "made contracts" for the company to come and get the promised premium. The real question considered was whether that agent could waive payment of the premium in cash, and it was held that as a "general agent" he could do so, notwithstanding a limitation contained, not in the *application,* but in the *policy.* The *Schlink* case may be

dismissed with the remark that it is in conflict with the views of this court, and is no authority here.

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The facts disclosed by the record are almost undisputed. The propositions of law applicable to them are clear. It seems plain that if the case had been tried at law before a jury in the Federal court no verdict adverse to respondent would have been allowed to stand. Under such circumstances the submission of the case to a jury would have been an idle form. Even upon Lord's own statement at the conclusion of the evidence it would have been the duty of the court to direct a verdict for respondent. No substantial injury has resulted to petitioner requiring a reversal of the decree, but justice has been done, and it is respectfully submitted that the decree should be affirmed.

WM. G. BEALE,
Of Counsel for Respondent.

APPENDIX.

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OPINION IN CIRCUIT COURT OF APPEALS UPON FIRST APPEAL.
(39 C. C. A., 264; 98 Fed., 761.)

The appellant (plaintiff below), a life insurance company, is a corporation organized under the laws of the State of New York, and doing business in the City of New York. It brings this suit in equity against the defendant, Alice A. Cable, a citizen of Chicago, Ill., as administratrix of Herman D. Cable, to cancel a certain policy of insurance issued by the plaintiff upon the life of said Herman D. Cable in January of the present year. There was a general demurrer put in by the defendant to the bill of complaint, and this appeal is from an order and decree of the circuit court sustaining the said demurrer, and dismissing the bill for want of equity.

The facts, as alleged in the bill, are substantially as follows: on the 16th of January, 1899, Herman D. Cable, a resident of Evanston, Ill., made application in writing to the plaintiff for insurance upon his life in the sum of $50,000. The application was forwarded to the New York office of the plaintiff, and the plaintiff on or about the 17th day of February, 1899, executed its policy numbered 94,082, upon the life of Cable, agreeing, in further consideration of $848.50 to be paid on delivery thereof, and of a like sum to be paid on the 6th day of February in each and every year thereafter until 10 years' premiums should have been paid, and upon acceptance of satisfactory proofs of the death of Cable within 10 years, ending on the 6th day of February, 1909, that the plaintiff would pay $50,000 in 30 consecutive annual instalments of $1,666.66, to the estate of Cable, —subject, however, to certain terms and conditions

set forth in said policy and in the application therefor, one of which was that the policy should take effect only in case of delivery of the policy during the sound health and insurable condition of the insured. The policy, after its execution, was sent by the plaintiff to its agent in Chicago, Joseph H. Strong, and on or about the 21st day of February, 1899, was tendered to Cable, who refused to accept it or to pay the first premium thereon, saying that he wanted some further information about the plaintiff. When said Cable made his application for insurance, a like application was made by his friend, George S. Lord, also a resident of Evanston. A similar policy of insurance upon the life of Lord was issued by the plaintiff, and on the 27th day of February, 1899, was delivered: being actually handed to Lord by one James F. McCabe, an attorney and insurance broker of Chicago, through whom Lord and Cable had, by mutual arrangement, made their respective applications for insurance. On the last-mentioned date Lord learned from McCabe that Cable had not accepted his policy, and Lord thereupon requested said McCabe to obtain the policy written for Cable, and to bring it to him (Lord); saying that he (Lord) would take the policy, and would pay the first premium upon it in behalf of Cable. Thereupon, on the same day, McCabe obtained from the plaintiff, and delivered to Lord, the policy upon the life of Cable, and received from Lord the premium due thereon, and said premium was duly received by the plaintiff. On Friday evening, the 24th day of February, 1899, Cable became ill. During the following night or next day his illness was diagnosed as pneumonia, and his condition was then regarded as serious; and on Sunday, the 26th, his life was despaired of by the physicians. On Thursday, March 2nd, he died, as the result of acute

pneumonia. Lord was well aware of the serious physical condition of Cable on Sunday, February 26th, and knew that he was believed by his physicians to be suffering from pneumonia. On the morning of Monday, February 27th, and before Lord had seen McCabe on that day, Lord visited or communicated with the family of Cable, and on the afternoon of that day procured the delivery to him of the policy upon the life of Cable, with full knowledge of the dangerous illness of Cable, and of the stipulation in the policy and in the application that the policy should take effect only upon payment of the first premium, and upon its delivery during the sound health and insurable condition of Cable, and with the wrongful intent and purpose of having the policy become immediately effectual for the benefit of the estate of Cable in case his illness should terminate fatally. The plaintiff had no knowledge of Cable's illness until his death. That said illness was not made known to the plaintiff but was purposely and wilfully concealed from it, and, had the plaintiff known of his condition it would not have delivered to said Cable the policy, and the plaintiff never authorized the delivery of the policy through Lord under the conditions existing when Lord obtained it. The premium which Lord paid was paid with the funds of Lord, and not those of Cable. Cable never authorized Lord to accept the policy and pay for the same, and did not during his lifetime ratify what was done. Lord was not an agent of Cable for the purpose of receiving the policy and paying the premium. The procuring of the policy by Lord was not a delivery to Cable, and the procuring of the policy and its delivery by him to Cable individually did not create an effectual contract. In the forenoon of the same day, and an hour or more before the filing of the original bill in this case, the defendant began in the superior court of Cook County an action at law against the plaintiff for the computed

amount of said policy of insurance, laying the damages at $55,000, and caused a summons to be issued, which was served upon the agent of the plaintiff on the 15th day of May, 1899. The summons in this action was served upon the defendant on the day on which the bill was filed, to wit, on the 11th day of May, 1899. The bill further alleges, by way of showing that the plaintiff has not an adequate and complete remedy at law, that the state of Illinois, by legislative enactment, has sought to prevent the removal into this court by insurance companies of actions similar to this, and has destroyed such right, or made its exercise impracticable, by providing that insurance companies shall forfeit and lose their right to do business in the state of Illinois upon removing any such action into this court; that by removing the action to this court the plaintiff might lose its right to transact business in the state of Illinois, and would certainly become involved in a serious controversy with the state respecting the transaction of any subsequent business by the plaintiff therein; that the laws of the state upon certain questions of general insurance law, as interpreted by its highest legal tribunal, and applicable to the fact in this case, are somewhat different from the law as interpreted by the federal court upon the same questions, and, from the standpoint of the federal courts are unduly and erroneously adverse to insurance companies; that the plaintiff is entitled to an application of the law according to the decisions of the federal court, and that under the facts set forth in the bill the plaintiff is without a due and proper remedy at law in respect to the claim of the defendant under said insurance policy, and is without any remedy at law whatever in the United States court; that prior to the filing of the original bill the amount of the premium paid by Lord, with lawful interest thereon was offered

and tendered by the plaintiff to Lord and to the defendant in lawful money of the United States which was refused by them. Other facts and circumstances are alleged, but these are sufficient for the purpose of determining the question before the court.

Gilbert E. Porter, for Appellant.

W. S. Oppenheim, for Appellee.

Before Woods, *Circuit Judge*, and Bunn and Allen, *District Judges*.

Bunn, *District Judge*, after making the foregoing statement, delivered the opinion of the court.

It must, we think, be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy, unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and, if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court under the circumstances set out in the bill, then the United States circuit court in equity should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff, of having its rights determined in an action at law, does not meet the requirements of the rule: the first is that the plaintiff being a citizen of New York, and the defendant a citizen of Illinois, the plaintiff, under the Constitution, has the right to come to the Federal court for an adjudication. For a person entitled to litigate in the Federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. Second, the remedy open to

the plaintiff is one not under its own control, but in the control and discretion of the opposite party. These two principles, we think, are sufficient to confer a legal discretion upon the Federal court, which it ought to exercise, in favor of its own jurisdiction, in behalf of any person or corporation which, from its citizenship, has the undoubted privilege of having its rights adjudicated in the Federal court. The remedy at law, in order to defeat the right to proceed in equity, should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce* v. *Grundy,* 3 Pet., 210; 7 L. Ed., 655; *Sullivan* v. *Railroad Co.,* 94 U. S., 806; 24 L. Ed., 324.

And the application of the rule depends upon the circumstances of each case. *Watson* v. *Sutherland,* 5 Wall., 74; 18 L. Ed., 580.

In the Federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only to the law side of the Federal court. This was adjudicated as early as 1823, in *Mayer* v. *Foulkrod,* 4 Wash. C. C., 349; Fed. Cas. No. 9,341. That was a case in equity for the recovery of a legacy, and it was suggested that the complainant had a remedy at law in the state court; but the court, by WASHINGTON, J., said:

> "If the counsel for the defendant meant to argue that, because the plaintiff might have maintained an action in the state court for the recovery of the legacy, therefore the equity jurisdiction of this court is ousted, we must protest against the doctrine. This case is clearly within the jurisdiction of this court. No objection can be made to the jurisdiction of the equity side of it, but that there is complete and adequate remedy on the other side of this court. It is no argument to say that the plaintiff may have such a remedy

(could it even be truly said) in the state court. The conclusive answer is that the plaintiff is under no obligation to resort to that jurisdiction."

Bean v. *Smith*, 2 Mason, 252 Fed. Cas. No. 1,174, is a still earlier case,—decided in 1821; opinion by Mr. Justice STORY. This was an action in equity to set aside conveyances for fraud. The court, in its opinion, says:

"The other objection is not so much to the competency of the court, as in the nature of a demurrer to the bill for want of equity. Much stress has been laid upon that clause of the Judiciary Act of 1789 (Chapter 20, Sec. 16) which declares 'that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.' I take this clause to be merely affirmative of the general doctrine of courts of equity, and in no sense intended to narrow the jurisdiction of such courts. It has been repeatedly held by the Supreme Court that the equity jurisdiction of the courts of the United States does not depend upon what is exercised by courts of equity or courts of law in the several states, but depends upon what is a proper subject of equitable relief in courts of equity in England, the great reservior from which we have extracted our principles of jurisprudence. If, therefore, a bill of this sort states a case properly within the cognizance of courts of equity, according to the general doctrines of their jurisprudence, I should have no difficulty in overruling this objection, although the state courts of Rhode Island might afford some sort of remedy at law to aid the plaintiff. There are many cases in which courts of law and equity exercise a concurrent jurisdiction, and the judiciary act never intended to disturb that jurisdiction. In such cases it is supposed that the remedy at law is not adequate and complete for all the purposes for which the plaintiff may claim relief."

In the leading case of *Smyth* v. *Ames*, 169 U. S., 466; 18

Sup. Ct., 418; 42 L. Ed., 819, it is said in the very able opinion by Mr. Justice HARLAN that:

> "The adequacy or inadequacy of a remedy at law for the protection of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity wherever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the circuit courts of the United States. Case of *Broderick's Will*, 21 Wall., 503; 22 L. Ed., 599; *Holland* v. *Challen*, 110 U. S., 15; 3 Sup. Ct., 495; 28 L. Ed., 52; *Dick* v. *Foraker*, 155 U. S., 404, 415; 15 Sup. Ct., 124; 39 L. Ed., 201; *Bardon* v. *Improvement Co.*, 157 U. S., 327, 330; 15 Sup. Ct., 650; 39 L. Ed., 719; *Rich* v. *Braxton*, 158 U. S., 375; 15 Sup. Ct., 1006; 39 L. Ed., 1022. But if the case, in its essence, be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States wherever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of Federal jurisdiction."

Coler v. *Board* (C. C.), 89 Fed., 257, was a bill by the holders of county bonds to prevent the county officials from applying certain funds to any purpose except to pay the interest coupons. The defendants questioned the jurisdiction of the court on the same ground relied upon here. The court, by SIMONTON, C. J., in disposing of the question, says:

> "Such a remedy might, perhaps, be found in the practice under the Code of North Carolina, but this will not affect the ancient and well-established jurisdic-

tion of the court of equity. The adequacy or inadequacy of a remedy at law for the protection of one entitled on any ground to invoke the powers of a Federal court is not to be conclusively determined by the statute of the particular state in which suit may be brought. *Smyth* v. *Ames,* 169 U. S., 516; 18 Sup. Ct., 418; 42 L. Ed., 819. The test is, has he a remedy at law in this court? If he has not, then a court of equity has jurisdiction."

In *Stanton* v. *Embry,* 46 Conn., 595, a bill was filed to enjoin an action at law upon a judgment rendered in the District of Columbia.

In the opinion, by PARDEE, J., it is said:

"It is claimed by the counsel for the respondent that this right to go into the court which rendered the judgment and ask for a new trial,—a remedy which, it is claimed, is open to the petitioners under the laws of the District of Columbia,—is an adequate legal remedy, and that this court cannot assume equitable jurisdiction over the matter while the petitioners have this remedy. But no legal remedy can be considered adequate which a party is compelled to go into a foreign jurisdiction to avail himself of. It must be a remedy which our own courts can apply."

Suits for the cancellation and delivery up of conveyances, insurance policies, and other contracts, obtained by fraud, constitute an immemorial head of equity jurisdiction. Joyce, in his elaborate work on Insurance (Sec. 1674), says:

"If the contract is obtained by fraud or deception, or by false and fraudulent misrepresentations, . . . equity will take cognizance and grant relief. So, also, will jurisdiction be entertained if the party has no adequate remedy at law. But the fact that the party has an adequate remedy at law does not of necessity preclude a resort to equity, nor does it follow that for such reason a court of equity will refuse to entertain jurisdiction. If the special circumstances would render it inequitable, unjust, or a hardship to compel the

> plaintiff to await a suit at the instance of the other party, the court will exercise its power."

This, no doubt, is now the reasonable and well-established rule.

The case of *British Equitable Assur. Co.* v. *Great Western Ry. Co.*, 20 Law T., 422, was a case of the procurement of a policy of life insurance by a gross fraud, similar to the one practiced in this case, if the allegations of the bill be true. It was brought, also, as in this case, after the death of the insured. The same objection was made to the jurisdiction as is made in the case at bar. Lord Justice GIFFARD, in his opinion concurring in the main opinion, says:

> "I was surprised, I must say, to hear the question of jurisdiction argued in this case. If there is any one thing clearer than another, it is that in such a case as this this court has jurisdiction."

In that case the policy had been assigned before suit brought, but equity took jurisdiction to decree a cancellation; and Lord Justice SELWYN, after stating the circumstances of the fraud, concludes his opinion in these words:

> "Under these circumstances, therefore, I think it quite clear that the policy is a void policy, and one which the office was entitled to file a bill to have canceled and delivered up; and, considering the very serious consequences to insurance companies of disputing upon any other than very clear ground, in this case, as I have formed a very clear opinion that in my judgment they were fully justified in resisting this claim, that there was no foundation for this appeal, and that it must be dismissed with costs."

The fraud in the case at bar does not rest upon proof. It stands admitted by the answer. The deceased applies for an insurance upon his own life for $50,000. He answers all the questions in regard to his physical condition in a

satisfactory manner. He is physically sound when the application is made and the policy tendered. But he declines to receive it, because he wants to know something more of the company before investing. Afterwards, and before anything more is done, he is taken down with acute pneumonia, and his chances for life are desperate. His friend now steps in, knowing all the facts in regard to the changed condition of the assured, pays the premium, and takes a delivery of the policy to himself; the company knowing nothing of assured's sickness. That day, or the day but one after, the assured dies, as it was expected he would. The fraud perpetrated is something quite appalling, in the baldness and boldness of its outlines. Upon the allegations of fact in the bill which are admitted to be true, it stands out "gross as a mountain, open, palpable." Under the circumstances, it seems hardly incumbent on the court to make excuses for taking jurisdiction in equity to cancel the policy, without subjecting the company to the uncertainty and delay attending a litigation in the state court, over which it can exercise no essential control, but the jurisdiction of which rests substantially in the will and discretion of another party. Upon the hearing on the merits, if the evidence should present the case in any other light, and it should appear that the remedy at law would be adequate, the bill could then be dismissed.

Mr. Joyce (Joyce Ins., Secs. 1764, 1680) sums up the authorities on this subject in the following words:

> "The result of the cases seems to be this: that, if equitable interposition is sought before loss or death, the right of the plaintiff to the aid of the court is better than it would be were he to wait until after loss or death, when the question might arise whether his remedy by way of defense to an action at law on the policy would not be adequate, and when it would be necessary

to show that some obstacle prevented making the defense at law. In other words, having no remedy at law before loss, the case presented by a bill brought after loss would have to show, notwithstanding a then existing adequate remedy at law, that resort to equity was necessitated by some particular circumstance of equitable cognizance warranting equitable relief; and it would seem reasonable to state as a rule that the fact that the loss has occurred is not conclusive, and upon a proper averment of facts showing that a resort to equity is either necessary, expedient, or proper, or that some obstacle prevents a complete defense at law, the court may, in a reasonable and proper exercise of that discretion which is generally exercised in matters of cancellation, take cognizance and grant relief."

The case of *Insurance Co.* v. *Bailey,* 13 Wall., 616; 20 L. Ed., 501, is relied upon to show that a suit in equity cannot be maintained to cancel a policy after the death of the insured. But the case does not go quite so far as that. The case was heard in the circuit court upon the merits, and the bill dismissed because it appeared that an action at law was then pending in the same court upon the law side, and that the remedy which the complainant could avail himself of there would be adequate; and the supreme court affirmed the decree. What the court held was that, although equity had power to order the delivery up and cancellation of a policy of insurance obtained on fraudulent representations and suppressions of facts, yet it will not generally do so, when these representations and suppressions can be perfectly well used as a defense at law in a suit upon the policy. Here the suit at law was pending in the same court. There was no invitation to the plaintiff to go into another jurisdiction to seek an adjudication of his rights. The point was not raised nor adjudicated as to whether a remedy at law could be adequate, and as effectual as the

remedy in equity, where the complainant had not the remedy under his own control. In the recent case of *Bank* v. *Stone* (C. C.), 88 Fed., 383, heard before Mr. Justice HARLAN, sitting with the two circuit judges, this question seems to have been adjudicated. A bill was filed to restrain collection of taxes under an act of the legislature of Kentucky, upon the ground that the act was unconstitutional, in that it impaired the obligation of the contract contained in the bank's charter from the state. The case, like this, was heard upon demurrer to the bill. In answer to the same contention that is made here,—that an adequate remedy at law existed,—the court, by Mr. Justice HARLAN, says:

> "It would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary choose to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

And this rule seems perfectly reasonable and sound. A similar rule is applied in cases where a claim to real estate is set up against a party in possession, though in that case other considerations concur. The party in possession need not wait for an action of ejectment by his adversary, but may file his bill in equity to quiet the title and have the claimant's title adjudicated. It is, no doubt, true that the plaintiff, if it was willing to incur the loads and forfeitures imposed by the Illinois statutes upon foreign corporations doing business in that state, and who attempt to remove actions from the state to the Federal court, might go into the state court and have the action at law removed to the Federal

court. *Insurance Co.* v. *Morse,* 20 Wall., 445; 22 L. Ed., 365. *Barron* v. *Burnside,* 121 U. S., 186; 7 Sup. Ct., 931; 30 L. Ed., 915. *Southern Pac. Co.* v. *Denton,* 146 U. S., 202; 13 Sup. Ct., 44; 36 L. Ed., 377.

But when it came there it would not have control of it. The plaintiff in that cause would control the action. She could bring it to trial, or she could delay as long as possible, and then discontinue it; wait for the plaintiff's witnesses to die or go beyond the jurisdiction of the court, and then commence again in the same or some other state court. It would be in her discretion to say when and where the defendant should have his remedy. A remedy so much in the discretion and control of the adversary party can hardly be said to be as efficient practically as the one in equity to cancel the policy. Very likely the plaintiff would choose to try the case in the state court, rather than subject itself to the penalty of losing its business in the state. But should the plaintiff be put to such an election, under the circumstances of the case? It is quite evident the plaintiff has had no opportunity to bring this action before the death of the assured, because that death took place immediately after the delivery of the policy to Lord.

We are therefore of opinion, under the allegations of the bill,—the Federal court having, by the comencement of the suit, obtained jurisdiction both of the subject-matter and of the parties, and the only objection being that the plaintiff has an adequate remedy at law,—that the court should have entertained the cause and overruled the demurrer to the bill. The decree of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

XV

FROM ILLINOIS INSURANCE LAWS.

[FIRE INSURANCE.]

(Hurd's Revised Statutes, 1898, page 932, Par. 68.)

Section 22. It shall not be lawful for any insurance company, association or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; nor shall it be lawful for any mutual insurance company of any other State to transact any kind of business within this State other than that prescribed by section 13 of this act, unless said company is possessed of an amount of cash assets over and above all liabilities, including reinsurance reserve equal to the amount of capital stock required of stock companies; and any such company desiring to transact any such business as aforesaid, by any agent or agents in this State, shall first appoint an attorney in this State, on whom process of law can be served, and file in the office of the Auditor of Public Accounts a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted; and any process issued by any court of record in this State and served upon such attorney by the proper officer of the county in which such attorney may reside or may be found, shall be deemed a sufficient service of process upon such company; but service of process upon such company may also be made in any other manner provided by law.

In case any insurance company not incorporated in this State shall cease to transact business in this State, according to the laws thereof, the agents last designated, or acting as

such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing action upon any policy or liability issued or contracted while such corporation transacted business in this State, and service of such process for the causes aforesaid upon any such agent, shall be deemed a valid personal service upon such corporation.

And every such company, association or partnership shall also file a certified copy of their charter or deed of settlement, together with a statement, under the oath of the president or vice-president, or other chief officer, and secretary of the company for which he or they may act, stating the name of the company and place where located, the amount of its capital, with a detailed statement of its assets, showing the amount of cash on hand, in bank or in the hands of agents; the amount of real estate and how much the same is encumbered by mortgage; the number of shares of stock of every kind owned by the company; the par and market value of the same; amount loaned on bond and mortgage; the amount loaned on other security, stating the kind and the amount loaned on each, and the estimated value of the whole amount of such securitites; any other assets or property of the company; also stating the indebtedness of the company; the amount of losses adjusted and unpaid; the amount incurred and in process of adjustment; the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; also a copy of the last annual report, if any, made under any law of the State by which such company was incorporated; and no agent shall be allowed to transact business for any such company whose capital (or, if a mutual company, whose reinsurance reserve as required in section 13 of this act) is impaired to the extent

of twenty per cent. thereof, while such deficiency shall continue.

And any company incorporated by or organized under any foreign government shall, in addition to the foregoing, deposit with the Auditor of Public Accounts, for the benefit and security of policy holders residing in the United States, a sum not less than two hundred thousand dollars ($200,000), in stocks of the United States, or of the State of Illinois, in all cases to be equal to a stock producing six per cent. per annum—said stocks not to be received by said Auditor at a rate above their par value, or above their current market value—or in bonds and mortgages on improved unincumbered real estate in the State of Illinois, worth fifty per cent. more than the amount loaned thereon.

The stocks and securities so deposited may be exchanged, from time to time, for other securities, receivable as aforesaid.

And so long as the company so depositing shall continue solvent, and comply with the laws of this State, such company or association may be permitted by the said Auditor to collect the interest or dividends on said deposits; and where a deposit is made of bonds and mortgages, accompanied by full abstracts of title and searches, the fees for an examination of title by counsel, to be paid by the party making the deposit, shall not exceed twenty dollars for each mortgage, and the fee for an appraisal of property shall be five dollars to each appraiser, not exceeding two, besides expenses for each mortgage.

Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this State, without procuring from the Auditor of Public Accounts a

certificate of authority, stating that such company has complied with all the requisitions of this act which apply to such companies, and the name of the attorney appointed to act for the company.

The statement and evidences of investments required by this section shall be renewed from year to year, in such manner and form as may be required by said Auditor, with an additional statement of the amount of premiums received and losses incurred in this State during the preceding year, so long as such agency continues; and said Auditor, on being satisfied that the capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of the certificate, as aforesaid.

Any violation of any of the provisions of this act shall subject the party violating the same to a penalty of five hundred dollars ($500) for each violation, and of the additional sum of one hundred dollars ($100) for each month during which any such agent shall neglect to file such affidavits and statements as are herein required.

Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the State or government under the laws of which it is organized. The term "agent" or "agents" used in this section shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State.

The provisions of this section shall apply to all foreign companies, partnership associations and individuals whether incorporated or not. All insurance companies, as-

sociations or partnerships incorporated by or organized under the laws of any other State of the United States, or any foreign government, transacting the business of fire or marine insurance, or any other kind of insurance, in this State, shall make annual statements of their condition and affairs to the Auditor's office, in the same manner and in the same form as similar companies organized under the laws of this State.

In case of neglect or refusal to make such annual statement as aforesaid, all persons acting in this State as agents or otherwise, in transacting the business of insurance for said companies, corporations, associations, partnerships or individuals, shall be subject to the same penalties provided by law in case of the failure of any insurance company organized under the laws of this State to make an annual statement, as provided in this act.

Foreign insurance companies shall be required to make and file their annual statements and evidences on the first day of January in each year, or within thirty days thereafter, made out for the year ending on the preceding 30th of September. The supplementary annual statements of their business and affairs in the United States, duly verified by the resident manager of such company, shall be filed in the month of January in each year, made out for the year ending the 31st day of December, immediately preceding.

FROM ILLINOIS INSURANCE LAWS.

[COMPANIES NOT ORGANIZED IN THE UNITED STATES.]

(Hurd's Revised Statutes, 1898, page 922, Par. 40.)

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* It shall not be lawful for any insurance company, association, partnership or organization, incorporated by, or organized, or doing business under the laws of any foreign government, directly or indirectly, to take risks or transact any business of insurance in this State unless the sum of at least two hundred thousand dollars, ($200,000) in stocks of the United States, or of the State of Illinois, reckon at par, or in bonds and mortgages on improved unincumbered real estate in the State of Illinois worth fifty per cent. more than the amount loaned thereon shall be deposited with the insurance department of one of the States of the United States, for the benefit and security of all policy holders in the United States which said deposit, shall, for the purposes of this act be known as the capital of said company for the United States; and any such company desiring to transact any such business as aforesaid, by any agent or agents, in this State, shall first appoint an agent in this State, on whom process of law can be served, and file in the office of the Auditor of Public Accounts, a writtcn instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted; and any process issued by any court of record in this State, and served upon such attorney by the proper officer of the county in which such attorney may reside or may be found, shall be deemed a sufficient service of process upon such company, but service of process upon such company may also be made in any other manner now

provided by law. In case any such insurance company or association shall cease to transact business in this State, according to the laws thereof, the agents last designated or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing actions upon any policy or liability issued or contracted while such corporation transacted business in this State, and service of such process for the causes aforesaid, upon any such agent, shall be deemed a valid personal service upon such corporation. And every such company association or partnership, shall file a copy of their charter, deed of settlement or article of association, together with a statement under oath, of its president or vice-president, or other chief officer or resident manager, stating the name of the company, association or partnership, and place where located, the amount of its capital and assets in detail, deposited and held in the United States including the amount of cash on hand, in bank or in the hands of agents, the amount of real estate and how much the same is encumbered, the number of shares of stock of every kind owned by it, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned on other security, stating the kind and amount loaned on each, and the estimated value of the whole amount of such securities and assets; such statement shall not, however, include any deposits in any of the United States not made for the benefit and protection of all policy holders throughout the United States, nor shall any special deposits for the exclusive protection and benefit of policy holders in any one State, be treated as assets of said company under this act: Said statement shall also state the indebtedness of the company, the amount of its losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted

by it as illegal and fraudulent and all other claims existing against it in the United States. And no agent shall be allowed to transact business for any such company, association or partnership, whose capital deposited as aforesaid, is impaired to the extent of twenty per cent. thereof, while such deficiency shall continue, and every such company, association, or partnership, may, if it desires, also file a statement, under the oath of its president or vice-president, or other chief officer, of the amount of its capital and assets in detail held or deposited in any country other than the United States, showing the amount of cash on hand, in bank or in the hands of agents, the amount of real estate and how much the same is encumbered by mortgage, the number of shares of stock of every kind, owned by the company, the par and market value of the same, amount loaned on bond or mortgage, the amount loaned on other securities, stating the kind and amount loaned on each, and the estimated value of the whole amount of such securities and other assets, together with its indebtedness, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by it as illegal and fraudulent, and all other claims existing against it in the United States or elsewhere. And when any such company or association, shall file with the Auditor of Public Accounts, a certificate of the superintendent of the insurance department of any other State, stating that a deposit of two hundred thousand dollars, ($200,000) or more, or its equivalent for the protection of the policy holders in the United States, has been made by said company or association in that State in accordance with the existing laws of said State. Said company or association shall not be required to make any deposit in this State, so long as said deposit shall remain intact with the insurance department or treasurer of said State, a cer-

tificate of which, from the superintendent of the insurance department of that State, shall be annually filed with the Auditor of Public Accounts of this State, and so long as such company, association or partnership, shall continue solvent and continue possessed of such capital in the United States, and comply with the laws of this State, it may make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire and the risks of inland navigation and transporation and transact a general insurance business. It shall not be lawful for any agent or agents to act for any company or association or partnership referred to in this section, directly or indirectly, in taking risks or transacting the business of fire and inland insurance in this State without procuring from the Auditor of Public Accounts, a certificate of authority, stating that such company has complied with all the requisitions of this act; and the name of the attorney appointed to act for the company, association or partnership. The statement and evidences of capital required by this section shall be renewed from year to year in such manner and form as may be required by said Auditor, with an additional statement of the amount of premiums received and losses incurred in this State during the preceding year, so long as such agency continues; and the said Auditor, on being satisfied that such capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of the certificates as aforesaid. Any violation of any of the provisions of this act, shall subject the person violating the same to a penalty of five hundred dollars, for each violation, and the additional sum of one hundred dollars for each month during which any such agent shall neglect to file such affidavits and statements as are herein required. Every agent of any in-

surance company, association or partnership, herein referred to shall in all advertisements of such agency, publish its location, giving the name of the city, town or village, where its principal or home office is located, and the government under the laws of which it is organized or does business. The term "agent" or "agents" used in this section shall include any acknowledged agent, surveyor, broker, or any other person or persons, who shall in any manner aid in transacting the business of any insurance company not incorporated by the laws of one of the United States. The provisions of this section shall apply to all foreign companies, partnerships, associations, and individuals, whether incorporated or not. The statement and evidences of investment required by this act shall be renewed annually, in the month of January of each year, the statement of capital and business in the United States to be verified by the resident manager and to be made out for the year ending, December 31, immediately preceding; and in case a statement of the business affairs and property of the home office is filed, such statement shall also be for the year ending December 31st, next preceding; and the Auditor of State, on being satisfied that the capital, securities and investments remain secure shall furnish a renewal of such certificate. Unless a home office statement of the capital and affairs of any company or association is filed with the Auditor of Public Accounts as herein provided, neither it nor any agent shall be permitted to advertise any capital or assets not held or deposited in the United States; nor shall such company or association or its agent or agents be permitted to advertise as capital deposited in the United States a greater sum than the actual value thereof.

All acts or part of acts in conflict herewith, are hereby repealed.

XXV

FROM ILLINOIS INSURANCE LAWS.

[LIFE INSURANCE.]

(Hurd's Revised Statutes, 1898, page 952, Pars. 183, 187, 195, 201, 202, 203, 204.)

Section 3. It shall not be lawful for any person to act within this state, as agent or otherwise, in receiving or procuring applications for life insurance, or in any manner to aid in transacting the business of life insurance, referred to in the first section of this act, for any company or association incorporated by or organized under the laws of any other state government, unless such company has conformed, in such state or in this state, to the same requirements in regard to capital that are imposed by section one of this act upon companies in this state, or, in lieu thereof, has actual assets to the amount of at least $100,000, invested in the same manner as is prescribed in regard to capital in section one of this act.

Section 7. All life insurance companies chartered or organized in any other state of the United States, or beyond the limits of the United States, and doing business in this state, shall make an annual statement of their condition and affairs to the insurance department, in the same manner and in the same form as similar companies organized under the laws of this state. The auditor shall have authority to extend the time for filing such statement, for reasons which he shall deem good and sufficient, whether the company is organized in this state or elsewhere. The statements herein provided for shall be in lieu of any and all statements now required by any existing law; and the several provisions of the act approved February 12th, 1853, February 14th, 1855, and January 22d, 1857, are hereby repealed, so far as they relate to life insurance.

Section 15. Every life insurance company not organized in this state, before doing business in this state, shall, in writing, appoint an attorney, resident in this state, upon whom all lawful process against the company may be served with like effect as if the company existed in this state; and said writing or power of attorney shall stipulate and agree, on the part of the company making the same, that any lawful process against said company which is served on said attorney, shall be of the same legal force and validity as if served on said company. A copy of the writing, duly certified and authenticated, shall be filed in the office of the auditor, and copies certified by him shall be sufficient evidence. This agency shall be continued while any liability remains outstanding against the company in this state, and the power shall not be revoked until the same power is given to another, and a like copy filed as aforesaid. Service upon said attorney shall be deemed sufficient service upon the company.

Section 21. Every life insurance company not organized under the laws of this state shall, before doing business in this state, deposit with the auditor a copy of the charter of the company, and a statement signed and sworn to by the president or vice-president and secretary, in the form prescribed or authorized for the annual statement adapted to the business done by such company.

Section 22. Every person acting for a life insurance company not incorporated in this state, shall exhibit, in conspicuous letters, on the sign designating his place of business, the name of the state, under whose authority the company he represents has been incorporated; and said company and agents shall also have printed, in large type, the name of said state upon all policies issued to the citizens of this state, and on all placards, pamphlets and circulars pub-

lished, issued or circulated in this state by them or him, relating to the business of said company.

Section 23. Whoever solicits insurance on behalf of any life company not chartered by and not established within this state, or transmits, for any person other than himself, an application for life insurance, or a policy of life insurance, to or from such company, or advertises that he will receive or transmit the same, shall be held to be an agent of such company to all intents and purposes, and subject to all the duties, requisitions, liabilities and penalties set forth in the laws of this state relating to life insurance companies not incorporated by the legislature thereof.

Section 24. Any agent making insurance in violation of any law of this state regulating life insurance companies shall forfeit, for each offense, a sum not exceeding $500.

FROM ILLINOIS INSURANCE LAWS.

[INSURANCE DEPARTMENT.]

(Hurd's Revised Statutes, 1898, Page 915, Pars. 1 & 3.)

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That there shall be established a separate and distinct department to be known as the "Insurance Department of the State of Illinois," which department shall be charged with the execution of all laws now in force, or which shall hereafter be enacted, in relation to insurance and the insurance companies organized or doing business in the State of Illinois, and the chief officer of such department shall be styled the "Insurance Superintendent."

SECTION 3. The Insurance Superintendent shall possess all the powers and perform all the duties in regard to the business of insurance which are now attached by law to the office of the Auditor of Public Accounts, and he shall exercise the same control over the insurance companies, their officers and agents in this State, and collect from them all taxes, fees, fines and penalties as required by the laws of the State to be done by the Auditor of Public Accounts; and the said Auditor of Public Accounts is hereby relieved therefrom, from and after the appointment and qualification of such Insurance Superintendent.

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Opp'n to Beale's Pet. 28

Office Supreme Court U.S.
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OCT 16 1903
JAMES H. McKENNEY,
Clerk.

SECTION 23 OF ILLINOIS LIFE INSURANCE ACT OF 1869.
(Hurd's Revised Statutes for 1901, page 1057.)

Whoever solicits insurance on behalf of any life company not chartered by and not established within this State, or transmits, for any person other than himself, an application for life insurance, or a policy of life insurance, to or from such company, or advertises that he will receive or transmit the same, shall be held to be an agent of such company to all intents and purposes, and subject to all the duties, requisitions, liabilities and penalties set forth in the laws of this State relating to life insurance companies not incorporated by the Legislature thereof.

Compare with section on p. 15 post

Schlenk case, p. 2.

Thomas " p. 11

THE JOHN HANCOCK MUTUAL LIFE INSURANCE CO. v. SCHLINK, 175 Ill., 285.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. T. M. Shaw, Judge, presiding.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action brought by Paulina Schlink on a policy of insurance issued on July 22, 1895, by the John Hancock Mutual Life Insurance Company on the life of Frederick Schlink. In the declaration the policy was set out *in haec verba*, and it was averred that the policy was delivered to Frederick Schlink on the 7th day of August, 1895, and that he died on the 12th day of the same month. To the declaration the defendant pleaded the general issue, and also filed four special pleas, in which it set up a provision of the policy which reads as follows: "This policy shall not take effect until delivered and the first premium hereon paid during the lifetime and good health of the insured." Defendant averred that the policy was not delivered and the first premium paid during the lifetime and good health of the insured. To the pleas the plaintiff replied double: First, she traversed the facts set up in each plea; and second, she confessed the allegations of facts set up in the pleas and set up new matter in avoidance. In the replications confessing and avoiding it was averred that there was a waiver of the conditions of the policy on the part of the insurance company. To the replications rejoinders were filed, and on a trial before a jury the plaintiff recovered a verdict for $2175, upon which the court entered judgment, which, on appeal, was affirmed in the Appellate Court.

The appellant has assigned on the record six errors, three of which, the first, second and fifth, involve questions of fact which have been settled by the judgment of the Appellate Court and need not be considered here. The others, the third, fourth and sixth, are as follows:

"*Third*—The Appellate Court erred in holding that appellee's first, fourth, fifth and sixth instructions, or either of them, were the law.

"*Fourth*—The Appellate Court erred in holding that the trial court properly refused each of appellant's first, second, third, fourth and tenth refused instructions.

"*Sixth*—The Appellate Court erred in sustaining the rulings of the trial court in the admission and rejection of evidence."

In order to obtain a clear view of the questions of law presented by the record a brief statement of the facts is required. In the opinion of the Appellate Court will be found a statement of the facts which seems to be substantially correct, as follows:

"Charles Ballance was acting as agent for appellant at Peoria under a contract with J. B. Pendergast, the State agent of the appellant for the State of Illinois. Ballance had an office in Peoria, which had upon it a business sign designating him as general agent of appellant, and upon the stationery used by him he so called himself. While purporting to act as such agent Ballance solicited Frederick Schlink, appellee's husband, to take out a policy of insurance upon his life in appellant's company. After some negotiations between the parties an arrangement was made between Ballance and Schlink for the issuance of a policy on the life of the latter for $2000, upon which the premium was to be $63.70. In payment of this premium it was agreed by the parties that a certain indebtedness of $18, owing by one Downey to Schlink, should be assumed by Ballance and canceled, and that Ballance should take and receive from Schlink, in further part payment of the premium, a sewing machine to be selected by the wife of Ballance from the machines which Schlink had on hand for

sale, and the difference either way was to be paid in cash,—that is, if the machine and the Downey indebtedness amounted to more than the premium, Ballance should pay the difference in cash to Schlink, and on the other hand, if these two items did not pay the premium, Schlink should pay Ballance the difference in cash. In accordance with this agreement Frederick Schlink made and delivered to Ballance a formal application for a policy of insurance upon his life for the sum of $2000, which was forwarded by said Ballance to appellant company, which accepted the risk, issued the policy and forwarded the same to Ballance for delivery. After receiving the policy Ballance saw the assured, Frederick Schlink, and notified the latter he had the policy, and was told to come and get the sewing machine and the money for the premium. Before the policy was actually delivered the assured became ill with typhoid fever, whereupon the agent, Ballance, called on George Schlink, a brother of the assured, and informed him about the agreement and the policy, and told said George Schlink that if he would pay $25 he (the agent) would put the policy in force. After seeing the attending physician, said George Schlink went to the office of Ballance to pay the money and get the policy. Ballance being absent, his clerk accepted the $25 and delivered the policy. Three days afterwards the assured, Frederick Schlink, died from the effects of the typhoid fever."

The contract under which Ballance was appointed agent contained these provisions: "The said J. B. Pendergast hereby appoints said Charles Ballance agent, with authority to procure applications for policies of insurance upon the lives of individuals, and to collect premiums, in accordance with the rules of said company. * * * The said party of the second part, as said agent, shall in no case alter, modify, waive or change the terms, rates or conditions of any paper or document issued by said company, nor receive moneys due or to become due to said company except on policies or renewal receipts signed by an officer of said company."

It is contended in the argument of counsel for appellant —first, that Ballance was the agent of Pendergast, and not the agent of appellant, and hence he could not bind the company; second, that by the language of the policy, "no person except the president or secretary is authorized to make alterations or discharge contracts or waive forfeitures," although Ballance was the agent of the company he could not waive compliance with any of the provisions of the policy; third, that Ballance, although the agent of the company, could not accept anything in payment of the first premium but cash, nor could he waive performance of the rules of the company.

In the giving and refusing of instructions the court held adversely to appellant on the propositions mentioned, and what will be said in passing on the propositions will dispose of the third and fourth assignments of error without setting out the instructions given for the plaintiff and refused for the defendant.

As to the first proposition, by the terms of the contract under which Ballance was appointed he was authorized to procure applications for policies of insurance upon the lives of individuals, and to collect premiums, in accordance with the rules of the company. He was entrusted with the power of delivering policies for the company. Clothed, therefore, with the power of soliciting insurance, delivering policies and collecting premiums, Ballance was the agent of the insurance company, and not the agent of Pendergast. (Hurd's Stat. chap. 73, par. 203; *Continental Ins. Co.* v. *Ruckman*, 127 Ill. 364.) In the *Ruckman case* it was said (p. 376): "The General Assembly having power to impose upon foreign insurance companies coming into the State to do business, such reasonable terms and conditions

as it saw fit, had an undoubted right to make such companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents and in fact aid them in the transaction of their insurance business." The fact that the written contract under which Ballance was acting was made by Pendergast, State agent of the insurance company, did not constitute him an agent of Pendergast. Ballance advertised as general agent of the company. He acted for and in behalf of the company. The company accepted his acts and forwarded policies to him to be delivered in pursuance of contracts made by him.

As to the second contention, while it is true that the policy provides that no person except the president or secretary is authorized to make alterations, discharge contracts or waive forfeitures, yet if Ballance was the agent of appellant, as we think he was, with power to solicit insurance of Schlink, receive the application, forward it to appellant, receive the policy when issued, collect the premium and deliver the policy, then he had power to waive a condition of the policy. In Richards on Insurance (2d ed. sec. 95) the author says: "An agent of a life insurance company who is intrusted with the business of closing the contract by delivering the policy is held to have an implied authority to determine how the premium then due shall be paid, whether by cash, or, as is sometimes done, by giving credit, in which case the agent becomes the creditor of the insured and the debtor of the insurer. In that event, though the agent subsequently defaulted and the money never reached the company, the policy would still be binding. By the weight of authority the agent is held to have this discretionary power, although the policy in terms denies it; but this

is based upon his possession of the document for the purposes of delivery, and his instructions to deliver it, and consequently his power does not extend to subsequent premiums or premium notes."

In *Eclectic Life Ins. Co.* v. *Fahrenkrug,* 68 Ill. 463, it was said (p. 467): "It is insisted * * * by the terms of the policy the agents are prohibited from altering or discharging contracts or waiving forfeitures. This objection we do not deem tenable. The question in cases of this kind is not what power did the agent in fact possess, but what power did the company hold him out to the public as possessing. * * * It is immaterial what may have been said in the policy in regard to the payment of the premium. It was within the power of the company, acting through its agents, to change entirely the mode of or dispense with the payments as provided by the policy and adopt a different mode and time of payment."

In *Phenix Ins. Co.* v. *Hart,* 149 Ill. 513, this court said (p. 522): "The cases are not uniform throughout the country in respect of when notice to or knowledge of the agent, or representations by him, will bind the company. In this State, however, the decisions are uniform that notice to the agent, at the time of the application for the insurance, of facts material to the risk, is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent," citing *Atlantic Ins. Co.* v. *Wright,* 22 Ill. 462, and *Farmers and Merchants' Ins. Co.* v. *Chesnut,* 50 *id.* 111. Also, in the same case it was said (p. 524): "The stipulation in the policy that the waiver could be made only by indorsement upon the policy by the general agent at Chicago was inserted for the benefit of the insurer, and, like any other clause or condition of the policy,

might be waived by the company." See, also, *Terry* v. *Provident Fund Society,* 41 N. E. Rep. 18; 13 Ind. 1.

We now come to the third contention of appellant: that the agent, in the absence of express authority, could not accept anything but cash in payment of the premium, or any part thereof. It will be remembered that the premium in this case amounted to the sum of $63.70. Of this amount Ballance was entitled to retain, as his commission, seventy or seventy-five per cent, which would leave less than $20 going to the company. Ballance received $25 in cash,—enough to pay the company the amount it was entitled to receive and $5 in addition. The question then presented is, whether Ballance had the right to receive of the insured the amount which was going to him in anything but money. The policy contained this provision: "This policy shall not take effect until delivered and the first payment thereon paid during the lifetime and good health of the insured." There are authorities which hold that an agent cannot accept the premium which the company is entitled to receive, in anything but cash; but there are other authorities holding that a general agent may give credit and accept the note of the insured in lieu of cash, even when the policy provides for a cash payment. Mechem on Agency says (sec. 931, div. 1): "The insurance agent, as thus distinguished from the broker, is ordinarily held to be a general agent of the company. As such general agent it is held that he may waive forfeitures and conditions in the policy, notwithstanding a provision therein that no agent has such power; that he may waive pre-payment of the premium although the policy provides that it shall not take effect until the premium is paid." May on Insurance (vol. 2, sec. 360 b) says: "An agent authorized to take and approve risks and to in-

sure may allow credit. A general agent may waive the condition as to the payment of the first premium and give credit, even though the policy declares that the contract cannot be modified except by writing signed by the president or secretary." *Terry* v. *Provident Fund Society, supra,* is also a case in point. There the policy contained, in substance, the same conditions as here. One Carpenter (who was not a regular agent of the company) solicited the insurance. The policy was issued by the company and sent to an agent, who delivered it to Carpenter to deliver to the insured and collect the premium. Carpenter delivered the policy, collected $2.50 (one-half the premium) in cash and gave credit for $2.50, which was his commission. The cash premium failed to reach the company and it canceled the policy, but an accident having occurred the company was held liable. In *Lycoming Ins. Co.* v. *Ward,* 90 Ill. 545, where the agent accepted a part of the premium in goods as a part of his commission, it was held the payment was binding on the company. Here Ballance was authorized to solicit the insurance from Schlink, and although the policy required the premium to be paid in cash, Ballance had the right, so far as his commission was concerned, to waive the policy and accept his commission in property, if he saw proper to do so.

We think the ruling of the court on the instructions was substantially correct.

After the death of the assured it appears that Ballance wrote a letter to the State agent, Pendergast, which was read in evidence by appellee. Pendergast wrote a letter in reply, which the court refused to admit in evidence, and this ruling is relied upon as error. At the time this letter was written the assured was dead and the rights and obli-

gations of the parties under the policy had become fixed, and anything the State agent may have said in the letter could have had no bearing whatever on the rights of the parties. For this reason, if for no other, the court properly ruled that the letter was not competent evidence.

We think the judgment of the Appellate Court was right, and it will be affirmed.

Judgment affirmed.

UNITED FIREMEN'S INS. CO. v. THOMAS,
34 C. C. A. 240; 92 Fed. 127.

On Rehearing.

Before WOODS, JENKINS, and SHOWALTER, *Circuit Judges.*

JENKINS, *Circuit Judge.* The facts in this case are sufficiently stated in our former opinion. 53 U. S. App. 517, 27 C. C. A. 42, and 82 Fed. 406. We granted a rehearing of the case principally for a discussion of the question whether Prindiville, either as a matter of law or as a matter of fact, could be deemed the agent of the insurance company, appellant, in effecting the insurance in question. Aided by the oral arguments at such rehearing, and in view of certain decisions of the supreme court of the state of Illinois, we have carefully considered the case, both with respect to the question whether such agency can be deemed established as matter of fact or as matter of law, and the further question whether, under the statute of the state of Illinois, he must be deemed to be the agent of the insurance company because he participated in procuring the insurance in question. The evidence to our minds is undisputed and conclusive that Prindiville had never been in the service of this insurance company, was never authorized by it or its general agents to procure any insurance for it, was employed by the defendant in error to procure insurance for him in such companies as he might approve; that he placed such insurance in several companies, applying to the general agents of the plaintiff in error for a policy in that company; that he signed, on behalf of the defendant in error, the application for that insurance, and authorized the statements therein contained; that neither the plaintiff in error

nor its general agents were at any time advised by Prindiville or by the defendant in error or by any other person that other insurance upon the property insured had been or was expected to be procured; that Prindiville received from the several companies, probably upon the same day, the policies for which he had applied, delivered them to the defendant in error and received from him the premiums. He thereupon paid to the general agents of the plaintiff in error the premium due to the company, and was allowed by the general agents a certain commission. The question, then, is (irrespective of the statute of the state of Illinois, which we will consider hereafter) whether Prindiville, by reason of the facts stated, was the agent of the insurance company in such manner and to such extent that the company is chargeable with the knowledge that he possessed of other insurance upon the property insured. We are of opinion that he was not, and that the insurance company was not bound by his knowledge. Unless the fact that he was allowed by the general agents a commission—a certain proportion of the amount which they received from the company for placing insurance—can be deemed to constitute him an agent, there is no color for declaring him such. It might with equal propriety be said that if the son of the plaintiff in error had, on behalf of his father, sought this insurance and that placed in other companies, the plaintiff in error would be chargeable with the knowledge that the son possessed of other insurance obtained by him for his father. The payment by the general agents to Prindiville of a certain share of the commissions which they were entitled to retain of the premium did not constitute him an agent of the company. That fact did not authorize him in any way to represent the company by his act, or to charge them with his knowledge. He never had been, and was not then, in the service of the in-

surance company. He was employed by the defendant in error. Prindiville made application for him, and made the representations and warranties in his behalf. The policy was delivered to Prindiville as the agent of the defendant in error. It does not matter that the general agents of the insurance company delivered the policy to Prindiville for the defendant in error without exacting payment of the premium at the moment. If they saw fit to trust either of them for the amount until Prindiville could hand to his principal the policy and receive the premium, that was their choice and risk. The policy was none the less delivered when it was handed to Prindiville as the agent of the defendant in error, and was in force from that moment. If the property covered by it had been destroyed before Prindiville had opportunity to hand the policy to his principal, it would have been a loss covered by this policy. It was effective according to its terms from the moment of the delivery of the policy to Prindiville. Upon the question whose agent was he, the fact that the general agents allowed to Prindiville a certain proportion of their commission for placing the insurance in their company, if coupled with other facts, might be of some avail in determining the question of agency; but, standing alone, it is without probative force.

Thus, the supreme court of Illinois has said, in *Insurance Co.* v. *Rubin*, 79 Ill., 404:

> "This supposed agent is Mr. Ludlum, who was not at that time nor at any other time, the appointed agent of the company. He was a man in the habit of picking up, as a broker on the street, any risk of which he might get information. It was on his application to appellee that the policy was written. After this, Ludlum took the application to the agent of the company, and obtained the policy in question. In this he was the agent of appellee, and not of appellant. The fact

that the agent allowed him a commission does not change the character in which he acted."

And so, also, in *Insurance Co.* v. *Brooks,* 83 Md., 22; 34 Atl., 373, the principle is thus stated:

"It appears to be well settled that, when one engages another to procure insurance, the person so employed is agent for the insured, and not for the insurer, in all matters connected with such procurement."

See also, *Insurance Co.* v. *Klewer,* 129 Ill., 599, 611, 22 N. E., 489; *Standard Oil Co.* v. *Triumph Insurance Co.,* 64 N. Y. 85; *Devens* v. *Insurance Co.,* 83 N. Y. 168; *Melten* v. *Insurance Co.,* 5 Duer, 101; *Insurance Co.* v. *Reynolds,* 36 Mich., 502; *Insurance Co.* v. *Hartwell,* 123 Ind., 177, 24 N. E., 100; *Hamblet* v. *Insurance Co.,* 36 Fed., 118; Ostr. Ins., Sec. 45; Mechem, Ag., Sec. 931; Whart. Ag., Sec. 708; May, Ins., Sections 122, 123.

We come, then, to the question whether, under the statute of the state of Illinois, Prindiville must be regarded as the agent of the insurer, and in what respect such agent, and whether his knowledge should be imputed to the insurer. In other words, has the statute, as between insurer and insured, worked any change in the law? The statute to which we are referred is part of chapter 73 of the Revised Statutes of Illinois, and is part of section 40. That section treats of the terms upon which foreign companies may be authorized to do business in the state of Illinois. It provides for the appointment of an attorney in the state upon whom process may be served, and that a written instrument certifying such appointment shall be lodged with the auditor of public accounts. It provides that a copy of the charter shall be filed with the auditor, for the deposit of certain securities by a company organized under any foreign government, and that it shall not be lawful for any agent to act for any

company referred to in taking risk or transacting the business of fire or inland navigation insurance in the state of Illinois without procuring from the auditor of public accounts a certificate of authority stating that the company has complied with the requisitions of the act, and providing a certain penalty for violation of the act. Then follows the provision in question:

> "Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the state or government under the laws of which it is organized. The term 'agent or agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall, in any manner, aid in transacting insurance business of any insurance company not incorporated by the laws of this state."

The subsequent section of the chapter provides for revocation of the certificate by the auditor in case of false annual reports, for the examination by the auditor into the business of the company, and contains general provisions with respect to the inspection of state and foreign companies. The part of the statute quoted is the only provision to which we are referred, or which we have been able to find upon which is rested the contention that Prindiville is thereby created the agent of the insurance company.

It is apparent from the examination of the provisions of this chapter that the legislature of the state of Illinois is dealing with the relations which shall exist between foreign insurance companies and the authority of the state, and, as to them, declares what shall be done by such companies before they shall be authorized to do business within the state, or to continue the business of insurance under such authorization. It provides penalties for any infraction of the law. It sought to so hedge about the transaction of the business

of insurance that no foreign insurance company, by any cunning device, could overreach the statute and transact business within the state without compliance with the terms of the statute. It imposes penalties, not only upon the company which should so unlawfully transact business within the state, but, since the company was beyond the reach of its courts, like penalties were imposed upon any one within the state who should act for such company unlawfully transacting business within the state. And, that there might be no escape from compliance with the law, it was enacted that the term "agent," as used in the section in question, should include an acknowledged agent, surveyor, broker, or other person or persons who shall in any manner aid in transacting insurance business of any insurance company not incorporated by the laws of the state. Any such person was declared to be the agent of the company with respect to the penalties declared by the statute. This was done that there might be no evasion of the statute. This view of the sense in which the term "agent" is defined, and the purpose sought to be accomplished, throws light upon the decisions of the supreme court of Illinois which we are about to consider. The statute did not undertake to say that, as between the insurer and insured, one who acts for the insured in procuring insurance should be deemed to be the agent of the insurer.

The case of *People* v. *People's Ins. Exchange*, 126 Ill., 466, 18 N. E. 774, was an action brought in the name of the people to recover certain penalties provided by the section of the statute to which we have referred. The defendant was a corporation of Illinois, had an office in Chicago, and was engaged in soliciting and procuring insurance, delivering the policies and collecting premiums. It clearly ap-

peared that its actual business was to procure insurance for various parties in insurance companies doing business in other states which were not allowed to transact the business of insurance in the state of Illinois; and the defendant insisted that it acted, not as agent of the insurer, but as agent of the insured. It clearly was a case of an attempted evasion of the statute. It solicited the insurance. Policies were issued upon its representations to the foreign companies as to the condition and situation of the property proposed to be insured. The policies were sent by mail to the defendant, and by it delivered to the insured. It collected the premium, and remitted the same to the insurance companies, deducting the commissions. Clearly, it was the agent of the foreign companies, within the meaning of the statute, and properly subject to the penalties the statute imposed. As the court remarked:

> "Suppose the defendant corporation was not the agent of the foreign insurance companies in the ordinary sense of that term, still, if it in any manner aided these companies in the transaction of the business, it will, within the meaning of the act, be liable."

We certainly are not inclined in any way to dissent from that decision.

In *Insurance Co.* v. *Ruckman*, 127 Ill., 364, 20 N. E., 77, an action in chancery was brought by the insured for the reformation of a policy of insurance, and for a decree for the amount of the loss. Whipple and Smiley were the agents of the insurance company at Alton. Milne was in their service, and accustomed to solicit insurance for them. He solicited the insurance then in question, and assured the complainant that, if the insured premises did not remain vacant to exceed thirty days, the insurance would not be affected thereby, and agreed that the policies to be issued should so provide. On the following day, the complainant

applied at the office of Whipple and Smiley for the policy and found Milne there alone. The latter filled up a blank policy, delivered it to the complainant, and received from him the premium. The complainant was an illiterate man, being unable to read or write, which fact was known to Milne at the time. Upon being asked whether the clause in relation to the vacancy of the building was in the policy, Milne assured him that it was, and the complainant had no knowledge to the contrary until after the destruction of the buildings by fire. Here was clearly a case of fraud, and the policy was properly reformed to correspond with the contract made. And it is equally clear that Milne was authorized and accustomed to solicit and to make contracts of insurance. Having determined the case upon the ground that the act of Milne was the act of Whipple and Smiley, the agents of the company, and was within the authority which they had from the company, the opinion proceeded obiter to consider the statute in question. The writer of the opinion would seem to have inadvertently overlooked the sense in which the word "agent" is used in the statute, or the purpose for which it was employed. The opinion says properly enough that the general assembly had the undoubted right to make foreign companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents, and in fact aid them in the transaction of their insurance business, and then proceeds: "That such was the intention of the statute seems too plain to admit of doubt. We placed this construction upon said statute in *People* v. *People's Ins. Exchange*, 126 Ill., 466; 18 N. E., 774." As we have shown, that case was one between the people of the state and the Insurance Exchange, to enforce certain penalties of the statute, and is not authority for the assertion that as between insurer and insured the

statute made or designed any change in the law. It is proper also to observe that Milne was unquestionably authorized to solicit insurance by the general agents of the insurance company, and had authority to make the contract, and that, irrespective of any statute upon the subject; while, in the case with which we have to deal, Prindiville did not assume to act, nor did he aid them in the transaction of its insurance business, but acted for the insured. The opinion asserts authority for its conclusion in the respect mentioned in the decisions of the supreme court of Wisconsin upon the statute of that state. That statute differs widely from the Illinois statute, and does not treat alone of the relations between the state and the company, but is general. It is as follows (Rev. St. Wis., 1898, Sec. 1977):

> "Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation or advertises to do any such thing, shall be held to be an agent of such corporation, to all intents and purposes, unless it can be shown that he receives no compensation for such services."

Under this statute it is held that the rule was changed which required the insured at his peril to know whether the person with whom he is dealing had the power he assumed to exercise, or whether he was acting within the scope of his authority, and that one who procures policies from an authorized agent, delivers them, and collects and shares in the premium, is the agent of the company (*Schomer* v. *Insurance Co.*, 50 Wis., 575, 7 N. W., 544; *Knox* v. *Ins. Co.*, 50 Wis., 671, 7 N. W., 776); and that one who applies for

insurance, and delivers a policy in a company not represented by him, but by other agents, is its agent (*Alkan* v. *Ins. Co.*, 53 Wis., 136, 10 N. W., 91; *Body* v. *Ins. Co.*, 63 Wis., 157, 23 N. W., 132). But it is also held that the statute does not change the rule respecting the relations of principal and agent, and cannot be construed to prevent an insurance broker employed to procure insurance from another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies,—that the principal is bound by the acts and representations of the agent within the scope of his authority. *John R. Davis Lumber Co.* v. *Hartford Fire Ins. Co.*, 95 Wis., 226, 70 N. W., 84. The true meaning of the statute is well expressed in *Hankins* v. *Ins. Co.*, 70 Wis., 1, 35 N. W., 34: That the word "agent" is limited to the act of the particular person doing one or more of the things specifically designated; in other words, whenever an insurance company authorizes any person to do any one of the things thus specified, it cannot disclaim the agency of such person in the doing of anything necessarily implied in the specific act thus authorized, and that the word "agent" as used in these statutes, means, as expressly stated in the Illinois statute, an authorized agent of the company.

In *Wood* v. *Insurance Co.*, 126 Mass., 316, it is said of a similar statute that the statute relating to agents of insurance companies does not change the relation of the common law regulating the power of agents to bind their principals, and that the statute cannot be construed so as to prevent the person who is agent for the insurer for some purpose by virtue of the statute, from being the agent of the insured for other purposes, and that he may well be the agent for each in matters which do not conflict.

We have here the acknowledged fact that Prindiville was

never employed by the plaintiff in error, nor authorized to act for it; that he was the agent of the insured in procuring the policy, and in the application which he made. If it may be said with respect to the actual delivery of the policy by him to the assured that he was therein the agent of the insurer, the knowledge which he had of other insurance, derived from his agency for the insured, is not chargeable to the insurer merely because the company authorized him to deliver the policy drawn in accordance with the contract made, and upon representations made by him as agent of the insured. See, also, Ostr. Ins., Sec. 40, where the statutes of the various states are reviewed.

We need not stop to consider the Iowa statute, which is widely different from that before us, nor refer to the case of *Bennett* v. *Insurance Co.*, 70 Iowa, 600, 31 N. W., 948, further than to say that in that case the agent of the company, having authority to solicit insurance and issue policies, sent his clerk to solicit a risk and take an application, and the clerk soliciting and taking the application knew of other insurance upon the property; and it was held—we think properly so—that the company was bound by the knowledge of the clerk, who must be regarded as the company's soliciting agent.

We recognize the rule that the federal courts are bound to follow that construction of a state statute which has been deliberately placed upon it by the court of last resort of such state. If we could find such deliberate holding and construction here, we should follow it, although it was opposed to our own views of the question. But we cannot say here that there has been any such deliberate construction of the statute. The only expression which in any way can be construed to militate with our own view, is, as we have shown, an obiter expression in an opinion, and that expres-

sion is not binding even upon the court in which it was rendered. We think the expression is manifestly inadvertent, and without consideration of the sense in which the term "agent" is employed in the statute. It is directly opposed to the construction placed upon much broader statutes by the supreme courts of Massachusetts and of Wisconsin, the latter of which is erroneously invoked as authority by the author of the expression which it is said should control our judgment. We cannot consider the inadvertent expression in that case as a deliberate decision, giving a settled construction to the statute.

It was urged at the hearing that the other insurance effected upon the property was contemporaneous with the insurance in question, and did not fall within the condition which rendered the policy void, "if insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered, in whole or in part, by this policy." The case of *Insurance Co.* v. *Davison*, 30 Md., 91, is relied upon to sustain this contention. We think the cases clearly distinguishable. There the plaintiffs applied to the defendant company, seeking their whole insurance from that company; and the latter company, before issuing its policy, and for its own convenience, and not at the request of either of the plaintiffs applied to the Maryland Company to share the risk. The premises were examined by the secretaries of the two companies together, with the view of taking the risk conjointly. Both policies, as originally drawn were alike, of the same date, for the same amount, and the premiums paid to both companies on the same date. The court says, on page 109:

> "It thus appears the Maryland policy was effected with full knowledge on the part of the defendant,—indeed, at its request and for its convenience; that both

> policies were precisely similar, and became effective and binding contracts at the same time. The proviso is that, 'if any other insurance has been or shall hereafter be made on the said property' without the consent of the company in writing indorsed thereon, the policy shall be void."

After observing upon the necessity of such clauses in policies of insurance, the court held that, under the circumstances stated, the policy in the Maryland Company was neither prior nor subsequent to the policy sued on, but took effect contemporaneously, and was not within the spirit or letter of the clause in question. Without undertaking to criticise the ground upon which that decision rested, it is enough to say that we fully concur in the result there reached. The Washington Company, having itself procured the issuing of this policy, was estopped, in our judgment, to assert the condition prohibiting other insurance, or must be deemed to have waived it. Possibly this would be the better ground upon which to have placed the decision. But the facts of the case are widely divergent from those here presented. We do not think that decision controlling or relevant here. We are satisfied that a correct result was arrived at in our previous decision.

It is proper to say that Judge SHOWALTER sat at the hearing, and is understood to have concurred in the result, but died before the preparation of this opinion.

The judgment is reversed, and the cause remanded to the court below, with direction to award a new trial.

Supreme Court of the United States.

No. 28.—October Term, 1903.

Alice A. Cable, Administratrix, &c., Petitioner,
vs.
The United States Life Insurance Company of the City of New York.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 30, 1903.]

This case comes here upon certiorari, applied for by the petitioner, who was the administratrix of the estate of Herman D. Cable, deceased. (186 U. S. 482.) The suit was brought in the Circuit Court of the United States for the Northern District of Illinois by complainant, The United States Life Insurance Company, of the city of New York and a citizen of that State, against Alice A. Cable, a citizen of the State of Illinois, to have a certain policy of insurance for $50,000, payable as therein stated, upon the life of the said Herman D. Cable, delivered up for cancellation, on the ground that the same had been procured by the fraud of the agents of the deceased. The bill averred that the complainant was an insurance company of New York, lawfully engaged in doing business throughout the United States, and particularly in Illinois, under a permit or license duly granted therefor; that it had issued its policy upon the life of Herman D. Cable, and that it was procured by the fraud and fraudulent representations of his agents, such fraud and fraudulent representations being set forth at length; also that defendant had commenced a suit in the State court of Illinois to recover upon the policy, which suit was instituted about one and a half hours prior to the filing of complainant's original bill. A supplemental and amended bill was filed, in which, among other things, it was alleged:

"10. Your orator further avers that the Constitution and laws of the United States of America confer upon your orator the right to remove into this court said action at law so begun against your orator; that, on the other hand, the State of Illinois, by legislative enactment, has sought to prevent the removal to this court by insurance companies of actions similar to said action so begun by said administratrix, and has practically destroyed such right or made its exercise impracticable, by providing, in substance, that an insurance company shall forfeit and lose its right to do business in the State of Illinois upon removing any such action into this court; that by removing said action to this court your orator might lose its right to transact business in the State of Illinois, and would certainly become involved in serious controversy with said State respecting the transaction of any subsequent business by your orator in said State; that the laws of said State upon certain questions of general insurance law, as

interpreted by its highest legal tribunal, and applicable to the facts in this case, are somewhat different from the laws of the United States as interpreted by the Federal courts, upon the same questions, and from the standpoint of the laws of the United States, are unduly and erroneously adverse to insurance companies; that your orator is entitled to an application of the law according to the decisions of the Federal courts; and that under the facts and circumstances, hereinbefore set forth in this bill, your orator is without a due and proper remedy at law in respect to the claim of said administratrix under said policy of insurance, but is without any remedy at law whatever in this court."

To this bill the defendant interposed a demurrer, among other things, for want of equity, and that demurrer was sustained by the Circuit Court but upon appeal to the Circuit Court of Appeals for the Seventh Circuit the decree sustaining the demurrer was overruled and the case remanded to the Circuit Court. (98 Fed. Rep. 761; same case, 39 C. C. A. 214.)

An answer was then put in by the administratrix of Cable's estate denying any fraud, and averring that she had, before the suit in the Federal court was commenced, herself commenced an action upon the policy in a proper State court of Illinois, and that it was her intention and desire to push such action to a speedy conclusion if permitted by the Federal court.

The suit herein was tried and a decree entered that the policy was procured on behalf of the deceased by constructive fraud, and that no actual fraud was intended or practiced in the delivery of the same, and it was thereupon decreed that the policy should be delivered up and cancelled. The defendant appealed from such decree to the Circuit Court of Appeals, and the complainant took a cross-appeal so as to bring up the findings of fact as to the constructive fraud, so that, as counsel said, "the case might be heard and considered in the Circuit Court of Appeals upon the whole evidence, regardless of the findings of the master and of the Circuit Court." This was done for the reason that, in counsel's belief, the evidence showed a deliberate and intentional concealment on the part of Lord, the agent of the deceased, and therefore a plain fraud perpetrated by such agent. The Circuit Court of Appeals affirmed the judgment and upon application this court granted the writ of certiorari as stated.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

It is contended, upon the part of the administratrix of the estate of the assured, that the court below had no jurisdiction on the ground that there existed a complete and adequate remedy (or defense) at law when the company was sued upon the policy, and that the effect of allowing this jurisdiction in the Circuit Court is to improperly deprive the defendant herein of a trial by jury.

It is conceded by the plaintiff in error that no cause of action existed in favor of the complainant herein upon the law side of the Federal court, the contention being that the company could set up, as a defense to any action brought against it in the Federal court, those allegations of fraud which, being proved, would constitute a perfect and complete defense to any action upon the policy.

The company, however, avers that the administratrix has elected not to bring her action in the Federal court, although she might have done so on the ground of diversity of citizenship, but has, instead of so doing, brought it in the State court, and hence the company would have no opportunity of setting up its defense in a Federal court in an action brought on the policy, and it insists that on that account it has not that complete and adequate remedy or defense at law, in the same jurisdiction, which it contends is necessary in such case.

It is true that the remedy or defense which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction, and it must be a remedy which may be resorted to without impediment created otherwise than by the act of the party, and the remedy or defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, arising other than by reason of its own act.

It is also urged, as an answer to the claim of the company, as to jurisdiction, that even though the remedy or defense at law must exist in the same (Federal) jurisdiction, yet it is within the power of the company, if it see fit to do so, to remove the action in the State court to the Federal court, and thus its defense at law, while adequate, would also be within the same jurisdiction in which its suit in equity was commenced.

It is further insisted by the administratrix that it is unnecessary that an action at law should have been commenced in the same jurisdiction, but it is sufficient that the defense would be available and complete if such an action should be commenced in a Federal court of law.

As to the removal of the action from the State to the Federal court, the company avers that, even assuming it had the right so to remove, yet it insists that such removal would be too hazardous to the company by subjecting it to a possible revocation of its license to do business in the State to be of any adequate avail.

It is also argued upon the part of the company that the position of a defendant in an action is not so advantageous as that of a plaintiff, as the plaintiff has the conduct of a cause largely within his own control; and it is said that the law as administered in the State court is not so favorable to insurance companies as is the case in the Federal

courts, and that the company had the right to an administration of the law by the Federal instead of the State court by reason of the diversity of citizenship.

These objections are to be considered.

In Hurd's Revised Statutes of Illinois, chap. 73, title "Insurance," in relation to foreign insurance companies, it is provided: That any such company must first file a written application for a license, in which it shall state that it desires to transact the business of insurance, and that it will accept a license according to the laws of the State, "and that said license shall cease and terminate in case, and whenever, it shall remove or make application to remove into any United States courts, any action or proceeding commenced in any of the State courts of this State, upon any claim or cause of action arising out of any business transaction, in fact, done in this State," &c. The statute also provides that if any company thereafter removes or applies to remove into the United States court any action commenced in a State court of the kind above mentioned, "it is hereby made the imperative duty of the auditor of public accounts at once to revoke, cancel and annul the license issued to such incorporated company, association or partnership; and thereafter no such incorporated company, association or partnership shall transact within this State any business for which it was incorporated until again duly licensed. In case such revocation of license shall be made because of the removal of or the attempt to remove any action from a State court of this State to any United States court, no renewal of such license shall be made within three years after such revocation." Provision is also made that if the license is revoked, publication of the fact shall be made in the newspapers.

This court has held that, although there may be power in a Federal court of equity in a proper case to order the delivery up and cancellation of a policy of insurance obtained upon fraudulent representations and suppression of facts, yet it will not generally do so when those representations and suppressions can be perfectly well established in a defense at law in a suit upon the policy, and it, therefore, affirmed a decree which dismissed, without prejudice, a bill filed for obtaining the delivery up and cancellation of a policy so issued, although the evidences of the fraud were considerable and a suit on the policy had been begun in an action at law after the bill in equity was filed. (*Insurance Company* v. *Bailey*, 13 Wall. 616.)

That was a suit by the company to obtain the delivery up and cancellation of certain policies of life insurance after the death of the assured, on the ground that the policies had been procured by the defendant, the widow of the deceased, by fraudulent suppression of material facts, and by the misrepresentation of others of the same class. The answer denied the

allegations made. It was held that the company would have a perfect defense at law in an action by the holder upon the policy of insurance, and for that reason equity would refuse to take jurisdiction of an action to compel the delivery up and cancellation of the policy. The court said:

"By the death of the *cestui que vie* the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies, and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of trial by jury. Where a party, if his theory of the controversy is correct, has a good defense at law to 'a purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy."

To the same effect are *Home Insurance Company* v. *Stanchfield* (1 Dillon, 424;) *Ætna Life Insurance Company* v. *Smith*, (73 Fed. Rep. 318.)

Complainant insists that in this case special circumstances are shown that it may suffer irreparable injury if jurisdiction be denied. Those special circumstances have already been mentioned and the question is whether they are sufficient to furnish ground for a Federal court of equity to take jurisdiction herein.

We start with the proposition that, to any action brought upon the policy in a Federal court, the company would have a complete and adequate defense by proving the fraud as alleged in the bill herein. That shows a defense in the same jurisdiction resorted to by the complainant herein. It is answered, however, that the action has not been commenced in the Federal court, but, on the contrary, the administratrix has commenced her action in the State court, and hence the defense, if made in the State court, is not in the same jurisdiction as that in which the bill in this case was filed. But the company may bring its defense within the same jurisdiction by removing the case from the State to the Federal court, which it has the right to do on account of the diversity of citizenship of the parties thereto. No stipulation or agreement, founded on a State statute or otherwise, which the company may have entered into could prevent the removal of the case in the exercise of its constitutional right. This has been so held in *Insurance Company* v. *Morse*, (20 Wall. 445,) and that case has been repeatedly approved. See *Doyle* v. *Continental Insurance Company*, (94 U. S. 535; *Barron* v. *Burnside*, 121 Id. 186.)

In *Doyle* v. *Continential Insurance Company*, (*supra*,) it was held that a State had the right to impose conditions not in conflict with the Constitu-

tion nor the laws of the United States, to the transaction of business within its territory by a foreign insurance company, and to exclude such company from its territory, or, having given a license, to revoke it, with or without cause, and it was further decided that an injunction to restrain a State officer from revoking and cancelling a license to a foreign company to do business within the State, because the company has, contrary to the State statute, removed a case from the State to the Federal court, would not be granted, and it was remarked that, as the State had the right to exclude a foreign insurance company, the means by which she caused such exclusion or the motives of her action were not the subject of judicial inquiry. Whether this case has been shaken by the subsequent cases of *Barron* v. *Burnside*, (121 U. S. 186, 199;) *Blake* v. *McClung*, (172 Id. 239, 254,) and *Dayton Coal & Iron Company* v. *Barton*, (183 Id. 23, 25,) it is not material here to discuss. It has from an early day been held that a corporation created by one State could transact business in another State only with the consent, expressed or implied, of the latter State, and that such consent might be accompanied by such conditions as the latter State might think fit to impose, provided they were not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense. (*Lafayette Insurance Company* v. *French*, 18 How. 407; *Waters-Pierce Oil Company* v. *Texas*, 177 U. S. 28; *New York Life Insurance Company* v. *Cravens*, 178 Id. 389, 401; *Hancock Mutual Life Insurance Company* v. *Warren*, 181 Id. 73, 76.)

One thing is entirely clear, that the company could have removed this case from the State to the Federal court, notwithstanding the State statute or anything contained in its application for a license to do business within the State. Upon removal the company would have the full and adequate defense under the law as administered by the Federal courts that it would have in the equity case. Whether, as a result of such removal, the State would have the right by reason of the statute to revoke the license given to the company, is not a question which it is necessary for us to here discuss or determine. But assuming the right of removal, the company says that it may thereby subject itself to a revocation of its license, or at least to litigation, to prevent the State authorities from revoking it, and it ought not to be put to any such litigation or possible injury or inconvenience.

The embarrassment attaching to the complainant herein on account of a removal, if any, is one of its own creation. As a condition upon which it was admitted to do business in the State, it voluntarily signed the application, in which it promised to accept a license according to the laws of Illnois, and agreed that the license should terminate in case the company

should remove any action commenced in the State court to the United States court, as already stated. We think the existance of these facts furnishes no ground for appealing to a Federal court of equity to take jurisdiction of a suit to cancel the policy, where otherwise the court would have none. The State statute could not prevent the removal. If, because of a removal, ground was furnished for the revocation of the license, that fact would not justify a resort to a Federal court and ought not to, because, as we have said already, the contingency is one of the complainant's own creation, and it ought not, therefore, to be able to avail itself of an embarrassment which it has voluntarily created, as a foundation for jurisdiction in a Federal court which would not otherwise exist.

It signed its application to do business in order to come into the State and reap the profits which it thought it might earn by transacting its business in the State. There was no coercion upon it to make the application or to take the permit on the condition stated. Upon the whole, it chose to make such application and receive the license upon that condition.

If the condition be illegal and no ground for a revocation of the license, any subsequent litigation which the company may have by reason of such removal with the State officials to prevent the revocation of the license on that account is still matter caused by its own action, and cannot, in our judgment, furnish any ground for jurisdiction in the Federal courts.

Still less do we think that any foundation is laid for that jurisdiction based upon the theory that the company would not have the same control of the case as a defendant that it would as plaintiff. That is not the case in modern practice. The defendant can urge the case to trial against the desires of the plaintiff, and its defense may be shown as well and conveniently by a defendant, as the cause of action may be shown by the plaintiff. The right of the plaintiff to discontinue the action does not furnish ground for equitable jurisdiction. If it did, then equity would always have jurisdiction and the rule would be worthless.

The other ground stated as furnishing a special circumstance to show that complainant may suffer some irreparable injury if equity does not take jurisdiction, viz., that the law is more favorable to insurance companies as administered in the Federal than in the State court, and, therefore, equity ought to take jurisdiction in this case, upon the ground of the diversity of citizenship, cannot be regarded for a moment.

It is immaterial whether the assertion be conceded or denied. It furnishes no ground for equitable jurisdiction in a case like this. Where a plaintiff in a State court, which has jurisdiction over the subject matter, brings the defendant properly within such jurisdiction, he is entitled to a trial of his cause in that court, unless the case be removed to a Federal court upon some constitutional ground. If that ground exist, the removal can be made, but if it do not, equitable jurisdiction does not accrue to a

Federal court because it is thought the law as administered by that court more favorable to the party seeking its aid.

We think that, within the rule in *Insurance Company* v. *Bailey*, (*supra*,) the Circuit Court has no jurisdiction in this case. The judgment of the Circuit Court of Appeals for the Seventh Circuit and of the Circuit Court for the Northern District of Illinois must, therefore, be reversed, and the case remanded to the Circuit Court with directions to dismiss the bill, without prejudice.

It is so ordered.

Mr. Justice HARLAN and Mr. Justice WHITE dissented.

True copy.

Test:

Clerk Supreme Court, U. S.